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SUPREME COURT U.S.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 532

UNITED STATES OF AMERICA, APPELLANT

VS.

W. T. GRANT COMPANY, S. H. KRESS & COMPANY AND JOHN M. HANCOCK, ET AL

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED JANUARY 5, 1953

PROBABLE JURISDICTION NOTED FEBRUARY 2, 1953

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1 IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 73-296

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

W. T. GRANT COMPANY, S. H. KRESS & COMPANY, and JOHN M. HANCOCK,

Defendants.

Complaint—filed February 27, 1952

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this action against the defendants, and complains and alleges as follows:

JURISDICTION AND VENUE

1. This complaint is filed and these proceedings are instituted against the defendants under Section 15 of the Act of Congress of October 15, 1914, 15 U.S.C. §25, c. 323, 38 Stat. 730, 736, as amended, commonly known as the Clayton Act, in order to prevent and restrain the continuing violation by the defendants, as hereinafter alleged, of Section 8 of the Clayton Act. The corporate defendants W. T. Grant Company and S. H. Kress & Company transact business within this district and the individual defendant John M. Hancock resides within this district.

THE DEFENDANTS

2. W. T. Grant Company, hereinafter referred to as "Grant", is hereby made a defendant herein. Grant is a corporation organized and existing under the laws of the State of Delaware. Grant has capital, surplus and undivided profits aggregating more than $1,000,000 and is not a bank, banking association, trust company or common carrier subject to the Act to regulate commerce approved February 4, 1887.

2 3. S. H. Kress & Company, hereinafter referred to as "Kress", is hereby made a defendant herein. Kress is a corporation organized and existing under the laws of the State of New York. Kress has capital, surplus and undivided profits aggregating more than $1,000,000 and is not

a bank, banking association, trust company or common carrier subject to the Act to regulate commerce approved February 4, 1887.

4. John M. Hancock is hereby made a defendant herein. Said defendant is a resident of Scarsdale, in Westchester County, New York. For a number of years said defendant has been and now is a director of the defendant Grant. For a number of years said defendant has also been and now is a director of the defendant Kress.

NATURE OF TRADE AND COMMERCE

5. Defendant Grant is engaged in the purchase, distribution, shipment and sale of merchandise in interstate commerce.

6. Defendant Kress is engaged in the purchase, distribution, shipment and sale of merchandise in interstate commerce.

7. Both the defendants Grant and Kress purchase, distribute, ship and sell in interstate commerce many of the same classes of products, including, among others, men's, women's and children's clothing and apparel, yard goods, other domestic dry goods items, housewares, stationery, jewelry, notions, toilet goods, toys, sporting goods and hardware.

8. Defendant Grant sells the aforementioned classes of products at retail through approximately 484 stores operated by it throughout the United States.

9. Defendant Kress sells the aforementioned classes of products at retail through approximately 242 stores operated by it throughout the United States.

10. The defendant Grant operates approximately 70 retail stores located in approximately 68 communities
3 where approximately 70 retail stores operated by the defendant Kress are also located. In these communities the retail stores operated by the defendant Grant sell the aforementioned classes of products in competition with the retail stores operated by the defendant Kress.

11. The aforementioned classes of products flow across state lines in a continuous stream of interstate commerce from the states of purchase by the defendants Grant and Kress until they reach the ultimate consumers who buy the products from the defendants Grant and Kress in other states.

12. For many years the defendants Grant and Kress, by virtue of their business and location of operation, have been and now are competitors, so that the elimination of competition by agreement between them would constitute a violation of a provision of the antitrust laws.

OFFENSE CHARGED

13. For many years the defendant John M. Hancock has been a director at the same time of both the defendants Grant and Kress and is now a director of both the defendants Grant and Kress, in violation of Section 8 of the Clayton Act (15 U.S.C. §19, c. 323, 38 Stat. 732).

14. For many years the defendant Grant has permitted the defendant John M. Hancock to be elected and to serve as one of its directors at the same time that the defendant John M. Hancock was a director of the defendant Kress, and at the present time the defendant Grant continues to permit the defendant John M. Hancock to serve as one of its directors at the same time that the defendant John M. Hancock is a director of the defendant Kress, in violation of Section 8 of the Clayton Act.

15. For many years the defendant Kress has permitted the defendant John M. Hancock to be elected and to serve as one of its directors at the same time that the defendant John M. Hancock was a director of the defendant Grant, and at the present time the defendant Kress continues to permit the defendant John M. Hancock to serve as one of its directors at the same time that the defendant John M. Hancock is a director of the defendant Grant, in violation of Section 8 of the Clayton Act.

16. The defendants have threatened to continue and will continue the aforesaid violation of Section 8 of the Clayton Act unless the relief prayed for herein is granted.

PRAYER

WHEREFORE, plaintiff prays:

1. That it be adjudged and decreed that the defendants have violated Section 8 of the Clayton Act.

2. That the defendant John M. Hancock be ordered and directed immediately to resign his directorship in the defendant Grant or the defendant Kress, or both, as the Court shall direct, and immediately to withdraw from participation in the direction or control of the business of such

defendant company or companies from which he has been directed to resign.

3. That the defendant John M. Hancock be perpetually enjoined from becoming a director of serving as a director in any two or more competing corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in interstate commerce.

4. That the defendant company or companies from which the defendant John M. Hancock is directed to resign be compelled to accept his resignation and be enjoined from permitting him to be elected as a director or allowing him to serve as a director in the future.

5. That the defendants Grant and Kress each be perpetually enjoined from permitting to be elected or allowing to serve as a director any person who is at the same time a director of a competitor corporation engaged in interstate commerce.

6. That the plaintiff have such other, further, and different relief as the case may require and the Court may deem just and proper in the premises.

7. That the plaintiff recover its taxable costs.

ALLEN A. DOBEY
DONALD F. MELCHIOR
FRANCIS J. HECZEL JR.
Trial Attorneys

J. HOWARD MCGRATH
Attorney General

H. G. MORISON
Assistant Attorney General

SAMUEL K. ABRAMS
Special Assistant to the Attorney General

MELVILLE C. WILLIAMS
Special Assistant to the Attorney General

MYLES J. LANE
United States Attorney

6 [FILE ENDORSEMENT OMITTED]

7 IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Interrogatories Propounded by the Plaintiff—filed April 3, 1952

To: W. T. GRANT COMPANY.

PLEASE TAKE NOTICE that pursuant to Rule 33 of the Federal Rules of Civil Procedure, the above named defendant is required to answer the following interrogatories and to serve such answers upon the undersigned within fifteen days from the service hereof.

State separately with respect to each of the following interrogatories the name, address, and position or title of each person furnishing the answer thereto.

The name "Grant" when used herein shall be deemed to refer to the defendant W. T. Grant Company. The name "Kress" when used herein shall be deemed to refer to the defendant S. H. Kress & Company.

1. State the number of retail stores operated by Grant and give the location, including street address, of each such store.

2. State the distance from each such store to the nearest retail store of Kress.

3. With respect to each retail store operated by Grant state the items offered for sale.

4. With respect to each such store state approximately how long Grant has been engaged in selling each such item.

5. With respect to each such store state the name and location of each newspaper utilized for advertising any of such items for sale during 1951.

8 6. With respect to each such store state the name and location of each radio station utilized for advertising any of such items for sale during 1951.

7. With respect to each such store state the name and location of each TV station utilized for advertising any of such items for sale during 1951.

8. State as to each such store operated by Grant whether the store provides delivery service to customers of the store and if so the area within which such delivery service is provided.

9. State as to each such store operated by Grant which provides delivery service to customers whether there is a Kress retail store within the limits of the area within which such delivery service is provided.

10. State as to each such store operated by Grant which provides delivery service whether the delivery service includes deliveries across a state line.

11. State as to each such store operated by Grant whether the store accepts orders from customers by mail for shipment by mail or common carrier, and if so whether the store makes shipments across state lines pursuant to such orders, and give the limits of the area within which shipments are made pursuant to such orders by each such store.

12. State as to each such store operated by Grant whether the store accepts orders placed by customers in person or by telephone for shipment by mail or common carrier, and if so whether the store makes shipments across state lines pursuant to such orders, and give the limits of the area within which shipments are made pursuant to such orders by each such store.

13. State the total dollar volume of sales per each item per each retail store operated by Grant for the year 1951.

14. State which of the items sold in the retail stores operated by Grant are manufactured by Grant and give the place of manufacture.

15. State as to each of the items listed in answer to interrogatory 14 above whether Grant is continuously engaged in the manufacture of the item.

16. State which of the items sold in retail stores operated by Grant are purchased by Grant, from whom purchased, and from where shipped to, and where received by, Grant.

9 17. With respect to each of the items purchased by Grant for sale in its retail stores state whether Grant owns any of the stock of the company from which the item is purchased and if so the percentage of the total stock of such company owned by Grant.

18. State as to each of the items purchased by Grant for sale in its retail stores approximately how often, in the normal course of business, Grant purchases the item.

19. State the location of each warehouse operated by Grant and the location of each Grant retail store to which Grant makes deliveries from each such warehouse, and state the area within which Grant makes deliveries direct to retail customers from each such warehouse.

20. State approximately how often, in the normal course of business, shipments of each item listed in answer to interrogatory 3 above are made to each such warehouse.

21. State approximately how often, in the normal course of business, shipments of each such item are made from each such warehouse to each retail store of Grant.

22. State approximately how often, in the normal course of business, shipments from any source of each such item are made to each retail store of Grant.

23. State approximately how long, in the normal course of business, after the receipt of each such item, the item remains in a warehouse of Grant prior to shipment to a retail store of Grant.

24. State approximately how long, in the normal course of business, after the receipt of each such item by each retail store of Grant, the item remains in stock prior to sale and delivery to the customer.

25. State whether each retail store of Grant does its own buying, or whether Grant maintains a central purchasing organization for all its retail stores and if so where the central purchasing organization is located. If any retail store of Grant does any of its own buying, list the items purchased by such store, from whom purchased, and from where shipped to, and where received by, the store.

26. State as to each of the items listed in answer to interrogatory 3 above whether Grant is continuously engaged in selling the item through its retail stores.

27. State the length of time John M. Hancock has been a director of Grant and the length of the term for which directors of Grant are elected.

28. State whether the officers and directors of Grant have known that John M. Hancock was also a director of Kress and if so how long the officers and directors of Grant have known that John M. Hancock was a director of Kress.

29. State whether any officer or director of Grant has ever objected to the election of John M. Hancock to the board of directors or his membership on the board of

directors on the ground that John M. Hancock was also a director of Kress.

30. State whether the officers and directors of Grant have known that Kress was engaged in selling at retail items also sold at retail by Grant in the same areas and if so how long the officers and directors of Grant have had this knowledge.

ALLEN A. DOBEY
DONALD F. MELCHIOR
FRANCIS J. HEOZEL JR.
Trial Attorneys

SAMUEL K. ABRAMS
Special Assistant to the Attorney General

MELVILLE C. WILLIAMS
Special Assistant to the Attorney General

---

11 * * * * *

Affidavit of Service—(omitted in printing)

* * * * *

13 [FILE ENDORSEMENT OMITTED]

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14 IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Interrogatories Propounded by the Plaintiff—filed April 3, 1952

To: S. H. KRESS & COMPANY.

PLEASE TAKE NOTICE that pursuant to Rule 33 of the Federal Rules of Civil Procedure, the above named defendant is required to answer the following interrogatories and to serve such answers upon the undersigned within fifteen days from the service hereof.

State separately with respect to each of the following interrogatories the name, address, and position or title of each person furnishing the answer thereto.

The name "Kress" when used herein shall be deemed to refer to the defendant S. H. Kress & Company. The name "Grant" when used herein shall be deemed to refer to the defendant W. T. Grant Company.

1. State the number of retail stores operated by Kress and give the location, including street address, of each such store.

2. State the distance from each such store to the nearest retail store of Grant.

3. With respect to each retail store operated by Kress state the items offered for sale.

4. With respect to each such store state approximately how long Kress has been engaged in selling each such item.

5. With respect to each such store state the name and location of each newspaper utilized for advertising any of such items for sale during 1951.

6. With respect to each such store state the name and location of each radio station utilized for advertising any of such items for sale during 1951.

7. With respect to each such store state the name and location of each TV station utilized for advertising any of such items for sale during 1951.

8. State as to each such store operated by Kress whether the store provides delivery service to customers of the store and if so the area within which such delivery service is provided.

9. State as to each such store operated by Kress which provides delivery service to customers whether there is a Grant retail store within the limits of the area within which such delivery service is provided.

10. State as to each such store operated by Kress which provides delivery service whether the delivery service includes deliveries across a state line.

11. State as to each such store operated by Kress whether the store accepts orders from customers by mail for shipment by mail or common carrier, and if so whether the retail store makes shipments across state lines pursuant to such orders, and give the limits of the area within which shipments are made pursuant to such orders by each such store.

12. State as to each such store operated by Kress whether the retail store accepts orders placed by customers in person or by telephone for shipment by mail or common carrier, and if so whether the store makes shipments across state lines pursuant to such orders, and give the limits of

the area within which shipments are made pursuant to such orders by each such store.

13. State the total dollar volume of sales per each item per each retail store operated by Kress for the year 1951.

14. State which of the items sold in the retail stores operated by Kress are manufactured by Kress and give the place of manufacture.

15. State as to each of the items listed in answer to interrogatory 14 above whether Kress is continuously engaged in the manufacture of the item.

16 16. State which of the items sold in retail stores operated by Kress are purchased by Kress, from whom purchased and from where shipped to, and where received by, Kress.

17. With respect to each of the items purchased by Kress for sale in its retail stores state whether Kress owns any of the stock of the company from which the item is purchased and if so the percentage of the total stock of such company owned by Kress.

18. State as to each of the items purchased by Kress for sale in its retail stores approximately how often, in the normal course of business, Kress purchases the item.

19. State the location of each warehouse operated by Kress and the location of each Kress retail store to which Kress makes deliveries from each such warehouse, and state the area within which Kress makes deliveries direct to retail customers from each such warehouse.

20. State approximately how often, in the normal course of business, shipments of each item listed in answer to interrogatory 3 above are made to each such warehouse.

21. State approximately how often, in the normal course of business, shipments of each such item are made from each such warehouse to each retail store of Kress.

22. State approximately how often, in the normal course of business, shipments from any source of each such item are made to each retail store of Kress.

23. State approximately how long, in the normal course of business, after the receipt of each such item, the item remains in a warehouse of Kress prior to shipment to a retail store of Kress.

24. State approximately how long, in the normal course of business, after the receipt of each such item by each retail store of Kress, the item remains in stock prior to sale and delivery to the customer.

25. State whether each retail store of Kress does its own buying, or whether Kress maintains a central purchasing organization for all its retail stores and if so where the central purchasing organization is located. If any retail store of Kress does any of its own buying, list the items purchased by such store, from whom purchased, and from where shipped to, and where received by, the store.

26. State as to each of the items listed in answer to interrogatory 3 above whether Kress is continuously engaged in selling the item through its retail stores.

27. State the length of time John M. Hancock has been a director of Kress and the length of the term for which directors of Kress are elected.

28. State whether the officers and directors of Kress have known that John M. Hancock was also a director of Grant and if so how long the officers and directors of Kress have known that John M. Hancock was a director of Grant.

29. State whether any officer or director of Kress has ever objected to the election of John M. Hancock to the board of directors or his membership on the board of directors on the ground that John M. Hancock was also a director of Grant.

30. State whether the officers and directors of Kress have known that Grant was engaged in selling at retail items also sold at retail by Kress in the same areas and if so how long the officers and directors of Kress have had this knowledge.

ALLEN A. DOBEY
DONALD F. MELCHIOR
FRANCIS J. HEOZEL JR.
Trial Attorneys

SAMUEL K. ABRAMS
Special Assistant to the Attorney General

MELVILLE C. WILLIAMS
Special Assistant to the Attorney General

12

18

Affidavit of Service—(omitted in printing)

20 [FILE ENDORSEMENT OMITTED]

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21 IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Notice of Motion—filed May 5, 1952

SIRS:

PLEASE TAKE NOTICE that upon the complaint herein, the annexed affidavits of Edward Staley, sworn to on April 29, 1952, of John M. Hancock, sworn to May 1, 1952 and of John G. Byler, sworn to on May 5, 1952 the undersigned, attorney for W. T. Grant Company, will move this Court at a Stated Term for Motions to be held in Room 506 of the United States Court House, Foley Square, Borough of Manhattan, City, County and State of New York, on May 13, 1952, at 10:00 A.M., or as soon thereafter as counsel can be heard, for an order dismissing the complaint, pursuant to Rules 12 (b) (1) and 12 (b) (6) of the Federal Rules of Civil Procedure, on the grounds (i) that the controversy is moot; (ii) that authority to enforce compliance with Section 8 of the Clayton Act is vested in the Federal Trade Commission and not in this Court; (iii) that Section 8 of the Clayton Act is addressed to the individual who is a director, and not to the corporations; and that Section 8 of the Clayton Act is inapplicable to the defendant, W. T. Grant Company because defendant John M. Hancock was not a director of S. H. Kress & Company when he became a director of W. T. Grant Company; and for such other and further relief as to the Court may seem just and proper.

22 Dated: May 5, 1952.
New York, N. Y.

Yours, etc.,

EUGENE M. FOLEY
Attorney for Defendant,
W. T. Grant Company
1441 Broadway
New York 18, N. Y.

To:

MELVILLE C. WILLIAMS, ESQ.
Special Assistant to the Attorney General,
Anti-Trust Division,
Room 235, U. S. Court House,
Foley Square,
New York, N. Y.

---

23 [TITLE OMITTED]

Affidavit of Edward Staley

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

EDWARD STALEY, being duly sworn, deposes and says:

I am President of W. T. Grant Company, a defendant in the above action, and make this affidavit in support of its motion to dismiss the complaint on the ground that the action is moot.

This is an action brought under Section 8 of the Clayton Act alleging that it is unlawful for John M. Hancock to be, at the same time, a director of both the defendant S. H. Kress & Company, and the defendant W. T. Grant Company. The object of the action is to compel Mr. Hancock to terminate his directorship of one or the other of said companies.

I am informed and believe that on March 11, 1952, Mr. Hancock resigned as a director of S. H. Kress & Company. The object of this action has therefore been accomplished, and the question as to whether his being a director of both companies at the same time does or does not violate Section 8 of the Clayton Act is now moot.

EDWARD STALEY

Sworn to before me this
29th day of April, 1952.

CAROLINE T. KLEIN
Notary Public, State of New York
No. 41-2139325
Qualified in Queens County
Cert. filed with New York Co. Clerk
Term Expires March 30, 1953

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24 [TITLE OMITTED]

Affidavit of John M. Hancock

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

JOHN M. HANCOCK, being duly sworn, deposes and says:

I am a defendant in the above action, and make this supplemental affidavit in support of the motion of defendant W. T. Grant Company to dismiss the complaint herein.

I became a director of W. T. Grant Company on May 24, 1929 and was not a director of S. H. Kress & Company at that time. I did not become a director of S. H. Kress & Company until April 10, 1940.

JOHN M. HANCOCK

Sworn to before me this
1st day of May, 1952.

MORRIS GOLDEN
Notary Public, State of New York
No. 31-1479850
Qualified in New York County
Cert. filed with City Register N.Y. County
Commission expires March 30, 1953

---

25 [TITLE OMITTED]

Affidavit of John G. Byler

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

JOHN G. BYLER, being duly sworn, deposes and says:

I am and have been for more than ten years Financial Vice-President and Treasurer of W. T. Grant Company, a defendant in the above action, and I make this affidavit

in support of its motion to dismiss the complaint on the ground that this court is without jurisdiction in that authority to enforce compliance with Section 8 of the Clayton Act is vested in the Federal Trade Commission.

I am the officer of the company to whom the attorneys for the company report all legal matters and to whom any communication or demand of a legal nature, including any demand from the Federal Trade Commission, and other governmental agencies, would be referred.

I represent to this court that this defendant was never notified directly or indirectly that any agency of the Federal Government viewed Mr. Hancock's directorship in the W. T. Grant Company as a violation of Section 8 of the Clayton Act; nor was this defendant ever notified directly or indirectly that action was to be commenced against this defendant.

JOHN G. BYLER

Sworn to before me this
5th day of May, 1952.

CAROLINE T. KLEIN
Notary Public, State of New York
No. 41-2139325
Qualified in Queens County
Cert. filed with New York Co. Clerk
Term Expires March 30, 1953

26 [FILE ENDORSEMENT OMITTED]

---

27 IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Notice of Motion—filed May 5, 1952

SIRS:

PLEASE TAKE NOTICE that upon the complaint herein, the annexed affidavit of Orwill V. W. Hawkins, sworn to on the 5th day of May, 1952 and all of the proceedings had herein, the undersigned will move this Court at a Motion Term thereof to be held in Room 506 of the United States Courthouse, Foley Square, New York, on May 13, 1952 at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order dismissing the complaint herein pursuant to Rules 12(b)(1) and 12

(b)(6) of the Federal Rules of Civil Procedure on the grounds (1) that the controversy is moot; (2) that authority to enforce compliance with Section 8 of the Clayton Act is vested in the Federal Trade Commission and not in this Court; (3) that Section 8 of the Clayton Act is addressed to the individual who is a director and not to the corporation and for such other and further relief
28 as to the Court may seem just and proper.

Dated: May 5, 1952,
New York, New York.

Yours, etc.,

DUER, STRONG & WHITEHEAD

By HARMAN HAWKINS
A Member of the Firm
Attorneys for Defendant,
S. H. Kress & Company,
15 Broad Street,
New York 5, New York.

To:

MELVILLE C. WILLIAMS, ESQ.,
Special Assistant to the Attorney General,
Anti-Trust Division,
Room 1235,
United States Courthouse,
Foley Square, New York.

---

29 [TITLE OMITTED]

Affidavit of Orwill V. W. Hawkins

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

ORWILL V. W. HAWKINS, being duly sworn, deposes and says:

I am a Vice President of S. H. Kress & Company, a defendant in the above action, and make this affidavit in support of its motion to dismiss the complaint herein.

This is an action brought under Section 8 of the Clayton Act alleging that it is unlawful for defendant Hancock to be, at the same time, a director of both defendant Kress and defendant Grant. The object of the action is to compel defendant Hancock to terminate his directorship of one or the other of said defendant companies.

On March 11, 1952, defendant Hancock resigned as a director of S. H. Kress & Company and has since sold his stock in the Company and returned to the Company his files of Company matters, and has completely disassociated himself with defendant Kress.

I am informed by the affidavit of defendant Hancock, which is being submitted to this Court on the motion brought on by him contemporaneously with this motion that the Department of Justice has since June, 1947
30 been challenging his simultaneous directorships in the two defendant corporations and claiming that such constituted a violation on the part of defendant Hancock of Section 8 of the Clayton Act and that from that time until the commencement of this suit numerous conferences and discussions were had with the Department of Justice by defendant Hancock and his counsel during the course of which the Department of Justice advised defendant Hancock that it was its opinion that he should resign as a director of one or the other of the defendant corporations. Moreover it further appears that the Department of Justice has during all this time been entertaining and studying briefs submitted by defendant Hancock in a study by the Department of Justice to determine whether the simultaneous directorship alleged in the complaint constituted a violation of Section 8 of the Clayton Act.

The Department of Justice at no time called defendant Kress into these conferences or notified it that such conferences were proceeding or that it claimed defendant Kress had violated or was violating Section 8 or any other provision of the Clayton Act by reason of defendant Hancock having been elected a director thereof by its stockholders. Although the Department of Justice notified counsel for defendant Hancock under date of January 23, 1952 that it was the intention of the Department of Justice to institute legal proceedings against him the Department of Justice did not notify or warn defendant Kress of its intention to bring any such action.

Defendant Kress has regularly held its annual meetings on the 2nd Tuesday in May during the years 1948, 1949, 1950 and 1951. If defendant Kress had been informed by the Department of Justice that that Department con-
31 sidered that the simultaneous directorship of defendant Hancock in defendant Kress and defendant Grant would constitute a violation of Section 8 of the Clayton Act, the stockholders of defendant Kress could have disposed of the question of whether or not such simultaneous

directorship was in violation of Section 8 by failing to re-elect defendant Hancock as a director. Defendant Hancock became a director of Kress on April 10, 1940. The Department of Justice has at no time prior to the bringing of this action informed defendant Kress that defendant Hancock was a director of defendant Grant or that such relationship was claimed to be a violation of Section 8 of the Clayton Act.

Despite the fact that defendant Hancock resigned as a director of defendant Kress and Company on March 11, 1952, whereby the issues in this action became moot, the plaintiff served on defendant Kress by mail a list of thirty interrogatories which were received on April 3, 1952, which it has required defendant Kress to answer within fifteen days from the service thereof. A copy of said interrogatories, are annexed hereto from which it appears that the answering will place a tremendous burden on this defendant. Plaintiff threatens to continue this action against defendant Kress and to require it to answer the complaint herein and to answer the said interrogatories all of which and the defense of this suit can only be done by defendant Kress at great trouble and expense.

The object of this suit having been accomplished by
32 the resignation of defendant Hancock as a director of defendant Kress, the alleged violation of Section 8 of the Clayton Act is no longer before the Court and the question has become moot. Moreover, the equities in this case entitle defendant Kress to be relieved of the trouble, expense and participation in the adjudicating of a dead issue.

O. V. W. Hawkins

Sworn to before me this
5th day of May, 1952.

Stuart M. Hirschberg, Jr.
Notary Public, State of New York
No. 60-6912450
Qualified in Westchester County
Cert. filed with N.Y. Co. Clk's & Reg.
Commission Expires March 30, 1953

33 [TITLE OMITTED]

Interrogatories Propounded by the Plaintiff

To: S. H. KRESS & COMPANY.

[OMITTED. PRINTED SIDE PAGE 14 ANTE]

* * * * * *

38 [FILE ENDORSEMENT OMITTED]

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39 IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Notice of Motion—filed May 6, 1952

SIRS:

PLEASE TAKE NOTICE that upon the complaint herein, and the annexed affidavit of John M. Hancock, sworn to April 22, 1952, the undersigned will move this Court at a Stated Term for Motions to be held in Room 506 of the United States Court House, Foley Square, Borough of Manhattan, City, County and State of New York, on May 13, 1952, at 10:00 A.M., or as soon thereafter as counsel can be heard, for an order dismissing the complaint, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, on the grounds (i) that the controversy is moot; (ii) that authority to enforce compliance with Section 8 of the Clayton Act is vested in the Federal Trade Commission and not in this Court; and for such other and further relief as to the Court may seem just and proper.

Dated: May 5, 1952
New York, N. Y.

Yours, etc.,

SULLIVAN & CROMWELL

By EUSTACE SELIGMAN
(A Member of the Firm)
Attorneys for Defendant
John M. Hancock,
48 Wall Street,
New York 5, N. Y.

20

40 To:

MELVILLE C. WILLIAMS, Esq.,
Special Assistant to the Attorney General,
Anti-Trust Division, Room 235,
U. S. Court House,
Foley Square,
New York, N. Y.

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41 [TITLE OMITTED]

Affidavit of John M. Hancock

STATE OF FLORIDA,
COUNTY OF LEE, *ss.*:

JOHN M. HANCOCK, being duly sworn, deposes and says:

I am a defendant in the above action, and make this affidavit in support of my motion to dismiss the action on the ground that it is moot.

This is an action brought under Section 8 of the Clayton Act, alleging that it is unlawful for me to be, at the same time, a director of both the defendant W. T. Grant Company and the defendant S. H. Kress & Company. The object of the action is to compel me to terminate my directorship of one or the other of said companies.

On March 11, 1952 I terminated my directorship of S. H. Kress & Company. The object of this action has therefore been accomplished, and the question whether my being a director of both companies at the same time violates Section 8 of the Clayton Act is now moot.

My action was taken not because I believed that Section 8 of the Clayton Act is applicable, but because I did not believe I was justified in involving these two corporations in the trouble and expense which would be required
42 by a test of the action.

I have been advised by counsel that it is doubtful whether Section 8 of the Clayton Act is applicable to my concurrent directorship in these two corporations, and that the legal question is one of construction of the language of the Act, which has never heretofore been construed.

The question of the application of Section 8 of the Clayton Act to directorships held by me was first raised by the Department of Justice in the letter from John F. Sonnett, Assistant Attorney General, dated June 19, 1947. During the period of almost five years from such date to the be-

ginning of this action, my counsel and I had numerous conferences with the Department of Justice and submitted numerous memoranda of facts and of law to the Department of Justice.

On February 28, 1952, the United States Government instituted this action and also two other actions to terminate my concurrent directorships in two other pairs of companies.

On March 5, 1952, at the annual meeting of stockholders of The Kroger Company, the President of that company made the following statement:

> "John M. Hancock, who has served as a director of The Kroger Co. for 25 years, has asked me to state to this meeting that he has decided with great regret not to stand for reelection this year. Mr. Hancock explained that his decision was brought about by a suit recently commenced by the Department of Justice questioning whether Mr. Hancock can be a director of our company and of Jewel Tea Company at the same time.
>
> The Department of Justice has acted under a statute which states, in relevant part, that a person may not at the same time be a director of two companies if 'the elimination of competition by agreement between them would constitute a violation of any provisions of any of the antitrust laws.'
>
> 43 It is not claimed that any such agreement exists between our company and Jewel Tea Company or that it would be possible for the two companies, by agreement or otherwise, to eliminate competition in the food industry. Moreover, the statute was passed in 1914 but no court has ever said what it means. With reference to the antitrust laws in general, a Supreme Court Justice has said within recent years that not even the lawyers can determine 'what business conduct will be pronounced lawful or unlawful by the courts'.
>
> Due to the resulting confusion, the Congress has undertaken a clarification of the antitrust laws.
>
> Under all these circumstances, Mr. Hancock feels that he would prefer to avoid the necessity for our company's contesting the suit."

Following this public statement, I informed S. H. Kress & Company of my intention to resign as a director, and on March 11, 1952, I resigned from the Board of Directors

of S. H. Kress & Company, thus terminating my concurrent directorship in that company and W. T. Grant Company.

Following this statement, I likewise informed Bond Stores, Incorporated of my intention to resign as a director, and on March 14, 1952, I resigned from Bond Stores, Incorporated, thus terminating my concurrent directorship in that company and Sears, Roebuck and Company.

I have, of course, no intention of ever going back on the Board of Directors of S. H. Kress & Company as long as I remain a director of W. T. Grant Company. I have, through my counsel, advised the Department of Justice of this fact. It is obvious that my resignation is in no way a temporary expedient or stratagem, but a seriously considered decision after conferring with the officials of the corporations involved. My decision could not be revoked by me even if I wished to take such action hereafter, which I would never do.

The plaintiff has achieved its objective in the termination of my directorship of S. H. Kress & Company.
44 Nothing remains to be accomplished by continuing the action.

If the Court, or the plaintiff, deems it desirable, I should have no objection to the dismissal of this action being without prejudice to its revival in the event I should at any time in the future stand for election as, or become, a director of one of the corporate defendants while serving as a director of the other.

JOHN M. HANCOCK

Sworn to before me this
22 day of April, 1952.

R. C. KUHL
Notary Public, State of Florida at large
My commission expires Jan. 9, 1956.
Bonded by Mass. Bonding & Insurance Co.

* * * * * *

45 [FILE ENDORSEMENT OMITTED]

46 IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Stipulation—filed May 14, 1952

Interrogatories were served by plaintiff on April 2, 1952. By stipulations entered into by and between the attorney for the plaintiff and the attorney for W. T. Grant Company the time of said defendant to answer or move with respect to the interrogatories was extended to May 19, 1952.

It is now stipulated and agreed by and between the attorney for the plaintiff and the attorney for the defendant, W. T. Grant Company that the time to answer the interrogatories herein or to make any motion thereon be and the same is hereby extended to and including ten (10) days after a decision by the court on the pending motion of the defendant to dismiss the complaint in this action.

Dated: May 13, 1952

MELVILLE C. WILLIAMS
Attorney for Plaintiff

EUGENE M. FOLEY
Attorney for Defendant, W. T. Grant Company

So Ordered: 5/13/52

EDWARD WEINFELD
Judge, U. S. District Court, Southern District of New York.

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47 IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Stipulation—filed May 14, 1952

A written interrogatory having been served by mail on S. H. Kress & Company, one of the defendants herein in a wrapper post marked April 2, 1952, the time to answer said interrogatory presently expiring on the 19th day of May, 1952 and the defendants herein having made a motion to dismiss the complaint, it is hereby

STIPULATED, CONSENTED TO and AGREED by and between plaintiff and defendant, S. H. Kress & Company, that the

time to answer the interrogatory herein or to make any motion with respect thereto be and the same hereby is extended to and including ten (10) days after a decision by the Court on the pending motion of defendants herein to dismiss the complaint, and that an order to this effect may be entered herein.

MELVILLE C. WILLIAMS
Special Assistant to the Attorney General of the United States

DUER, STRONG & WHITEHEAD,
Attorneys for defendant,
S. H. Kress & Company

By HARMAN HAWKINS
A member of the firm

So ordered: May 14th, 1952.

EDWARD WEINFELD
U. S. D. J.

48 [FILE ENDORSEMENT OMITTED]

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49 IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Supplemental Affidavit of Orwill V. W. Hawkins—filed December 31, 1952

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

ORWILL V. W. HAWKINS, being duly sworn, deposes and says:

I am a Vice President of S. H. Kress & Company, a defendant in the above action and make this supplemental affidavit in support of its motion to dismiss the action on the ground that it is moot.

At a meeting of the Board of Directors of S. H. Kress & Company held on the 4th day of March, 1952, the number of directors on the Board of Directors of said Company was reduced from eight to seven, effective the 13th day of May, 1952, by the following resolution:

"RESOLVED, that from and after the meeting of the stockholders on the 13th day of May, 1952, and until

further action of the Board of Directors of the Company after that date, the Board of Directors of the Company shall consist of seven members."

The annual meeting of the stockholders of S. H. Kress & Company was held on the 13th day of May, 1952 at which time defendant Hancock was not reelected to the Board of Directors.

O V W HAWKINS

Sworn to before me this
16th day of May, 1952.

CHARLES HOUGHTON
Notary Public, State of New York
No. 63-1868100
Qualified in Bronx County
Cert. filed with New York County
Clerk's and Register's Office
Commission Expires March 30, 1953

IN

UNITED STATES DISTRICT COURT

Civil Action No. 73-297

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

SEARS, ROEBUCK AND COMPANY, BOND STORES, INCORPORATED, and JOHN M. HANCOCK,

Defendants.

Complaint—filed February 27, 1952

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this action against the defendants, and complains and alleges as follows:

JURISDICTION AND VENUE

1. This complaint is filed and these proceedings are instituted against the defendants under Section 15 of the Act of Congress of October 15, 1914, 15 U.S.C. §25, c. 323, 38 Stat. 730, 736, as amended, commonly known as the Clayton Act, in order to prevent and restrain the continuing

violation by the defendants, as hereinafter alleged, of Section 8 of the Clayton Act. The corporate defendants Sears, Roebuck and Company and Bond Stores, Incorporated transact business within this district and the individual defendant John M. Hancock resides within this district.

THE DEFENDANTS

2. Sears, Roebuck and Company, hereinafter referred to as "Sears", is hereby made a defendant herein. Sears is a corporation organized and existing under the laws of the State of New York. Sears has capital, surplus and undivided profits aggregating more than $1,000,000 and is not a bank, banking association, trust company or common carrier subject to the Act to regulate commerce approved February 4, 1887.

51 3. Bond Stores, Incorporated, hereinafter referred to as "Bond", is hereby made a defendant herein. Bond is a corporation organized and existing under the laws of the State of Maryland. Bond has capital, surplus and undivided profits aggregating more than $1,000,000 and is not a bank, banking association, trust company or common carrier subject to the Act to regulate commerce approved February 4, 1887.

4. John M. Hancock is hereby made a defendant herein. Said defendant is a resident of Scarsdale, in Westchester County, New York. For a number of years said defendant has been and now is a director of the defendant Sears. For a number of years said defendant has also been and now is a director of the defendant Bond.

NATURE OF TRADE AND COMMERCE

5. Defendant Sears is engaged in the manufacture, purchase, distribution, shipment and sale of merchandise in interstate commerce.

6. Defendant Bond is engaged in the manufacture, purchase, distribution, shipment and sale of merchandise in interstate commerce.

7. Both the defendants Sears and Bond manufacture or purchase, and distribute, ship and sell in interstate commerce many of the same classes of products, including, among others, men's and women's apparel, haberdashery, shoes, and other related products.

8. Defendant Sears sells the aforementioned classes of products at retail through approximately 665 stores oper-

ated by it throughout the United States. Defendant Sears also sells the aforementioned classes of products at retail by mail order throughout the United States.

9. Defendant Bond sells the aforementioned classes of products at retail through approximately 57 stores operated by it throughout the United States. Defendant Bond also sells the aforementioned classes of products at retail by mail order from its retail stores throughout the United States.

52 10. The defendant Sears operates approximately 64 retail stores located in approximately 40 communities in 17 states of the United States and the District of Columbia where approximately 47 retail stores operated by the defendant Bond are also located. In these communities the retail stores operated by the defendant Sears sell the aforementioned classes of products in competition with the retail stores operated by the defendant Bond. The defendant Sears and the defendant Bond also sell at retail the aforementioned classes of products by mail order in competition with each other.

11. The aforementioned classes of products flow across state lines in a continuous stream of interstate commerce from the states of manufacture or purchase by the defendants Sears and Bond until they reach the ultimate consumers who buy the products from the defendants Sears and Bond in other states.

12. The defendants Sears and Bond ship and sell at retail the aforementioned classes of products across state lines to ultimate consumers located in states other than those from which the shipments and sales are made.

13. For many years the defendants Sears and Bond, by virtue of their business and location of operation, have been and now are competitors, so that the elimination of competition by agreement between them would constitute a violation of a provision of the antitrust laws.

OFFENSE CHARGED

14. For many years the defendant John M. Hancock has been a director at the same time of both the defendants Sears and Bond and is now a director of both the defendants Sears and Bond, in violation of Section 8 of the Clayton Act (15 U.S.C. §19, c. 323, 38 Stat. 732).

15. For many years the defendant Sears has permitted the defendant John M. Hancock to be elected and to serve

as one of its directors at the same time that the defendant John M. Hancock was a director of the defendant Bond, and at the present time the defendant Sears continues to
53 permit the defendant John M. Hancock to serve as one of its directors at the same time that the defendant John M. Hancock is a director of the defendant Bond, in violation of Section 8 of the Clayton Act.

16. For many years the defendant Bond has permitted the defendant John M. Hancock to be elected and to serve as one of its directors at the same time that the defendant John M. Hancock was a director of the defendant Sears, and at the present time the defendant Bond continues to permit the defendant John M. Hancock to serve as one of its directors at the same time that the defendant John M. Hancock is a director of the defendant Sears, in violation of Section 8 of the Clayton Act.

17. The defendants have threatened to continue and will continue the aforesaid violation of Section 8 of the Clayton Act unless the relief prayed for herein is granted.

PRAYER

WHEREFORE, plaintiff prays:

1. That it be adjudged and decreed that the defendants have violated Section 8 of the Clayton Act.

2. That the defendant John M. Hancock be ordered and directed immediately to resign his directorship in the defendant Sears or the defendant Bond, or both, as the Court shall direct, and immediately to withdraw from participation in the direction or control of the business of such defendant company or companies from which he has been directed to resign.

3. That the defendant John M. Hancock be perpetually enjoined from becoming a director or serving as a director in any two or more competing corporations, any one of which has capital, surplus and undivided profits aggregating more than $1,000,000, engaged in interstate commerce.

4. That the defendant company or companies from which the defendant John M. Hancock is directed to resign
54 be compelled to accept his resignation and be enjoined from permitting him to be elected as a director or allowing him to serve as a director in the future.

5. That the defendants Sears and Bond each be perpetually enjoined from permitting to be elected or allowing to

serve as a director any person who is at the same time a director of a competitor corporation engaged in interstate commerce.

6. That the plaintiff have such other, further, and different relief as the case may require and the Court may deem just and proper in the premises.

7. That the plaintiff recover its taxable costs.

ALLEN A. DOBEY
DONALD F. MELCHIOR
FRANCIS J. HEOZEL JR.
Trial Attorneys

J. HOWARD MCGRATH
Attorney General

H. G. MORISON
Assistant Attorney General

SAMUEL K. ABRAMS
Special Assistant to the Attorney General

MELVILLE C. WILLIAMS
Special Assistant to the Attorney General

MYLES J. LANE
United States Attorney

55 [FILE ENDORSEMENT OMITTED]

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56 IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Interrogatories Propounded by the Plaintiff—filed April 3, 1952

To: SEARS, ROEBUCK AND COMPANY.

PLEASE TAKE NOTICE that pursuant to Rule 33 of the Federal Rules of Civil Procedure, the above named defendant is required to answer the following interrogatories and to serve such answers upon the undersigned within fifteen days from the service hereof.

State separately with respect to each of the following interrogatories the name, address, and position or title of each person furnishing the answer thereto.

The name "Sears" when used herein shall be deemed to refer to the defendant Sears, Roebuck and Company. The name "Bond" when used herein shall be deemed to refer to the defendant Bond Stores, Incorporated.

1. State the number of retail stores operated by Sears and give the location, including street address, of each such store.

2. State the distance from each such store to the nearest retail store of Bond.

3. With respect to each such store operated by Sears state which of the following items are offered for sale:

MEN'S APPAREL

1. Suits
2. Hats
3. Shoes
4. Ties
5. Socks
6. Suspenders
7. Cuff Links
8. Belts
9. Shirts
10. Sport Shirts

57

WOMEN'S APPAREL

11. Blouses
12. Coats
13. Suits
14. Handkerchiefs
15. Neckerchiefs
16. Skirts
17. Sweaters
18. Lingerie
19. Stockings
20. Gloves
21. Handbags
22. Umbrellas

BOYS' APPAREL

23. Suits (for six-year-olds and over)

OTHER ITEMS

24. Suitcases

4. With respect to each such store state approximately how long Sears has been engaged in selling each such item.

5. With respect to each such store state the name and location of each newspaper utilized for advertising any of such items for sale during 1951.

6. With respect to each such store state the name and location of each radio station utilized for advertising any of such items for sale during 1951.

7. With respect to each such store state the name and location of each TV station utilized for advertising any of such items for sale during 1951.

8. State as to each such store operated by Sears whether the store provides delivery service to customers of the store and if so the area within which such delivery service is provided.

9. State as to each such store operated by Sears which provides delivery service to customers whether there is a Bond retail store within the limits of the area within which such delivery service is provided.

10. State as to each such store operated by Sears which provides delivery service whether such service includes deliveries across a state line.

11. State as to each such store operated by Sears whether the store accepts orders from customers by mail for shipment by mail or common carrier, and if so whether the store makes shipments across state lines pursuant to such orders, and give the limits of the area within which shipments are made pursuant to such orders by each such store.

58 12. State as to each such store operated by Sears whether the store accepts orders placed by customers in person or by telephone for shipment by mail or common carrier, and if so whether the store makes shipments across state lines pursuant to such orders, and give the limits of the area within which shipments are made pursuant to such orders by each such store.

13. State the total dollar volume of sales per each item listed in answer to interrogatory 3 above per each such store operated by Sears for the year 1951.

14 State which of the items listed in answer to interrogatory 3 above are manufactured by Sears and give the place of manufacture.

15. State as to each of the items listed in answer to interrogatory 14 above whether Sears is continuously engaged in the manufacture of the item.

16. State which of the items listed in answer to interrogatory 3 above are purchased by Sears, from whom purchased, and from where shipped to, and where received by, Sears.

17. With respect to each of the items listed in answer to interrogatory 16 above state whether Sears owns any of the stock of the company from which the item is purchased, and if so the percentage of the total stock of such company owned by Sears.

18. State as to each of the items listed in answer to interrogatory 16 above approximately how often, in the normal course of business, Sears purchases the item.

19. State the location of each warehouse operated by Sears and the location of each Sears retail store to which Sears makes deliveries from each such warehouse, and state the area within which Sears makes deliveries direct to retail customers from each such warehouse.

20. State approximately how often, in the normal course of business, shipments of each item listed in answer to interrogatory 3 above are made to each such warehouse.

21. State approximately how often, in the normal course of business, shipments of each such item are made from each such warehouse to each retail store of Sears.

59 22. State approximately how often, in the normal course of business, shipments from any source of each such item are made to each retail store of Sears.

23. State approximately how long, in the normal course of business, after the receipt of each such item, the item remains in a warehouse of Sears prior to shipment to a retail store of Sears.

24. State approximately how long, in the normal course of business, after the receipt of each such item by each retail store of Sears, the item remains in stock prior to sale and delivery to the customer.

25. State whether each retail store of Sears does its own buying, or whether Sears maintains a central purchasing organization for all its retail stores and if so where the central purchasing organization is located. If any

retail store of Sears does any of its own buying of any of the items listed in answer to interrogatory 3 above, state which of such items are purchased by such store, from whom purchased, and from where shipped to, and where received by, the store.

26. State as to each of the items listed in answer to interrogatory 3 above whether Sears is continuously engaged in selling the item through its retail stores.

27. State the location of each mail order plant, order office, factory, or warehouse from which shipments are made pursuant to mail orders and the limits of the area within which such shipments are made by each such mail order plant, order office, factory or warehouse.

28. State which of the items listed in answer to interrogatory 3 above Sears sells by mail order, and, in the normal course of business, to what areas of the United States shipments of the items are made pursuant to mail orders.

29. State which of the items listed in answer to interrogatory 3 above Sears, in the normal course of business, ships pursuant to mail orders to areas where retail stores of Bond are located and to which such areas.

60 30. State the length of time John M. Hancock has been a director of Sears and the length of the term for which directors of Sears are elected.

31. State whether the officers and directors of Sears have known that John M. Hancock was also a director of Bond and if so how long the officers and directors of Sears have known that John M. Hancock was a director of Bond.

32. State whether any officer or director of Sears has ever objected to the election of John M. Hancock to the board of directors or his membership on the board of directors on the ground that John M. Hancock was also a director of Bond.

33. State whether the officers and directors of Sears have known that Bond was engaged in selling at retail items also sold at retail by Sears in the same areas and if so how long the officers and directors of Sears have had this knowledge.

ALLEN A. DOBEY
DONALD F. MELCHIOR
FRANCIS J. HEOZEL JR.
Trial Attorneys

SAMUEL K. ABRAMS
Special Assistant to the Attorney General

MELVILLE C. WILLIAMS
Special Assistant to the Attorney General

61

Affidavit of Service—(omitted in printing)

62 [FILE ENDORSEMENT OMITTED]

63 IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Interrogatories Propounded by the Plaintiff—filed April 3, 1952

To: BOND STORES, INCORPORATED.

PLEASE TAKE NOTICE that pursuant to Rule 33 of the Federal Rules of Civil Procedure, the above named defendant is required to answer the following interrogatories and to serve such answers upon the undersigned within fifteen days from the service hereof.

State separately with respect to each of the following interrogatories the name, address, and position or title of each person furnishing the answer thereto.

The name "Bond" when used herein shall be deemed to refer to the defendant Bond Stores, Incorporated. The name "Sears" when used herein shall be deemed to refer to the defendant Sears, Roebuck and Company.

1. State the number of retail stores operated by Bond and give the location, including street address, of each such store.

2. State the distance from each such store to the nearest retail store of Sears.

3. With respect to each retail store operated by Bond state the items offered for sale.

4. With respect to each such store state approximately how long Bond has been engaged in selling each such item.

5. With respect to each such store state the name and location of each newspaper utilized for advertising any of such items for sale during 1951.

64 6. With respect to each such store state the name and location of each radio station utilized for advertising any of such items for sale during 1951.

7. With respect to each such store state the name and location of each TV station utilized for advertising any of such items for sale during 1951.

8. State as to each such store operated by Bond whether the store advertises items for sale by mail order.

9. State as to each such store operated by Bond whether the store provides delivery service to customers of the store and if so the area within which such delivery service is provided.

10. State as to each such store operated by Bond which provides delivery service to customers whether there is a Sears retail store within the limits of the area within which such delivery service is provided.

11. State as to each such store operated by Bond which provides delivery service whether such delivery service includes deliveries across a state line.

12. State as to each such store operated by Bond whether the store accepts orders from customers by mail for shipment by mail or common carrier, and if so whether the retail store makes shipments across state lines pursuant to such orders, and give the limits of the area within which shipments are made pursuant to such orders by each such store.

13. State as to each such store operated by Bond whether the store accepts orders placed by customers in person or by telephone for shipment by mail or common carrier, and if so whether the store makes shipments across state lines pursuant to such orders, and give the limits of the area within which shipments are made pursuant to such orders by each such store.

14. State the total dollar volume of sales per each item per each retail store operated by Bond for the year 1951.

15. State which of the items sold in the retail stores operated by Bond are manufactured by Bond and give the place of manufacture.

16. State as to each of the items manufactured by Bond and sold in its retail stores whether Bond is continuously engaged in the manufacture of the item.

65 17. State which of the items sold in retail stores operated by Bond are purchased by Bond, from whom purchased, and from where shipped to, and where received by, Bond.

18. With respect to each of the items purchased by Bond for sale in its retail stores state whether Bond owns any of the stock of the company from which the item is purchased and if so the percentage of the total stock of such company owned by Bond.

19. State as to each of the items purchased by Bond for sale in its retail stores approximately how often, in the normal course of business, Bond purchases the item.

20. State the location of each warehouse operated by Bond and the location of each Bond retail store to which Bond makes deliveries from each such warehouse, and state the area within which Bond makes deliveries direct to retail customers from each such warehouse.

21. State approximately how often, in the normal course of business, shipments of each item listed in answer to interrogatory 3 above are made to each such warehouse.

22. State approximately how often, in the normal course of business, shipments of each such item are made from each such warehouse to each retail store of Bond.

23. State approximately how often, in the normal course of business, shipments from any source of each such item are made to each retail store of Bond.

24. State approximately how long, in the normal course of business, after the receipt of each such item, the item remains in a warehouse of Bond prior to shipment to a retail store of Bond.

25. State approximately how long, in the normal course of business, after the receipt of each such item by each retail store of Bond, the item remains in stock prior to sale and delivery to the customer.

26. State whether each retail store of Bond does it own buying, or whether Bond maintains a central purchasing organization for all its retail stores and if so where the central purchasing organization is located. If any retail store of Bond does any of its own buying, list the items purchased by such store, from whom purchased, and from where shipped to, and were received by, the store.

27. State as to each of the items listed in answer to interrogatory 3 above whether Bond is continuously engaged in selling the item through its retail stores.

28. State the length of time John M. Hancock has been a director of Bond and the length of the term for which directors of Bond are elected.

29. State whether the officers and directors of Bond have known that John M. Hancock was also a director of Sears and if so how long the officers and directors of Bond have known that John M. Hancock was a director of Sears.

30. State whether any officer or director of Bond has ever objected to the election of John M. Hancock to the board of directors or his membership on the board of directors on the ground that John M. Hancock was also a director of Sears.

31. State whether the officers and directors of Bond have known that Sears was engaged in selling at retail items also sold at retail by Bond in the same areas and if so how long the officers and directors of Bond have had this knowledge.

ALLEN A. DOBEY
DONALD F. MELCHIOR
FRANCIS J. HOEZEL JR.
Trial Attorneys

SAMUEL K. ABRAMS
Special Assistant to the Attorney General

MELVILLE C. WILLIAMS
Special Assistant to the Attorney General

38

67 . . . . .

Affidavit of Service—(omitted in printing)

. . . . .

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69 In

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Notice of Motion—filed May 6, 1952

SIRS:

PLEASE TAKE NOTICE that upon the complaint herein, the annexed affidavits of John M. Hancock, sworn to on April 22, 1952, of C. E. Humm, sworn to April 22, 1952, of Irving Cohen, sworn to April 21; 1952, of Ellis H. Schechtman, sworn to May 2, 1952, and of John M. Hancock, sworn to May 1, 1952, the undersigned will move this Court at a Stated Term for Motions to be held in Room 506 of the United States Court House, Foley Square, Borough of Manhattan, City, County and State of New York, on May 13, 1952, at 10:00 A.M., or as soon thereafter as counsel can be heard, for an order dismissing the complaint, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, on the grounds (i) that the controversy is moot; (ii) that authority to enforce compliance with Section 8 of the Clayton Act is vested in the Federal Trade Commission and not in this Court; (iii) on behalf of defendants Sears, Roebuck and Company and Bond Stores, Incorporated, that Section 8 of the Clayton Act is addressed to the individual who is a director, and not to the corporations; and, on behalf of defendant Sears, Roebuck and Company, that Section 8 of the Clayton Act is inap-

70 plicable to it because defendant Hancock was not a director of Bond Stores, Incorporated when he became a director of Sears, Roebuck and Company; and for such other and further relief as to the Court may seem just and proper.

Dated: May 5, 1952.
New York, N. Y.

Yours, etc.

SULLIVAN & CROMWELL

By EUSTACE SELIGMAN
(A Member of the Firm)
Attorneys for Defendants,
48 Wall Street,
New York 5, N. Y.

To:

MELVILLE C. WILLIAMS, ESQ.,
Special Assistant to the Attorney General,
Anti-Trust Division,
Room 235, U. S. Court House,
Foley Square,
New York, N. Y.

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71 [TITLE OMITTED]

Affidavit of John M. Hancock

STATE OF FLORIDA,
COUNTY OF LEE, *ss.*:

JOHN M. HANCOCK, being duly sworn, deposes and says:

I am a defendant in the above action, and make this affidavit in support of my motion to dismiss the action on the ground that it is moot.

This is an action brought under Section 8 of the Clayton Act, alleging that it is unlawful for me to be, at the same time, a director of both the defendant Sears, Roebuck and Company and the defendant Bond Stores, Incorporated. The object of the action is to compel me to terminate my directorship of one or the other of said companies.

On March 14, 1952 I terminated my directorship of Bond Stores, Incorporated. The object of this action has therefore been accomplished, and the question whether my being a director of both companies at the same time violates Section 8 of the Clayton Act is now moot.

My action was taken not because I believed that Section 8 of the Clayton Act is applicable, but because I did not believe I was justified in involving these two corporations in the trouble and expense which would be re-
72 quired by a test of the action.

I have been advised by counsel that it is doubtful whether Section 8 of the Clayton Act is applicable to my concurrent directorship in these two corporations, and that

the legal question is one of construction of the language of the Act, which has never heretofore been construed.

The question of the application of Section 8 of the Clayton Act to directorships held by me was first raised by the Department of Justice in the letter from John F. Sonnett, Assistant Attorney General, dated June 19, 1947. During the period of almost five years from such date to the beginning of this action, my counsel and I had numerous conferences with the Department of Justice and submitted numerous memoranda of facts and of law to the Department of Justice.

On February 28, 1952, the United States Government instituted this action and also two other actions to terminate my concurrent directorships in two other pairs of companies.

On March 5, 1952, at the annual meeting of stockholders of The Kroger Company, the President of that company made the following statement:

> "John M. Hancock, who has served as a director of The Kroger Co. for 25 years, has asked me to state to this meeting that he has decided with great regret not to stand for reelection this year. Mr. Hancock explained that his decision was brought about by a suit recently commenced by the Department of Justice questioning whether Mr. Hancock can be a director of our company and of Jewel Tea Company at the same time.
>
> The Department of Justice has acted under a statute which states, in relevant part, that a person may not at the same time be a director of two companies if 'the elimination of competition by agreement between them would constitute a violation of any provisions of any of the antitrust laws.'
>
> 73 It is not claimed that any such agreement exists between our company and Jewel Tea Company or that it would be possible for the two companies, by agreement or otherwise, to eliminate competition in the food industry. Moreover, the statute was passed in 1914 but no court has ever said what it means. With reference to the antitrust laws in general, a Supreme Court Justice has said within recent years that not even the lawyers can determine 'what business conduct will be pronounced lawful or unlawful by the courts'.
>
> Due to the resulting confusion, the Congress has undertaken a clarification of the antitrust laws.

Under all these circumstances, Mr. Hancock feels that he would prefer to avoid the necessity for our company's contesting the suit."

Following this public statement, I informed S. H. Kress & Company of my intention to resign as a director, and on March 11, 1952, I resigned from the Board of Directors of S. H. Kress & Company, thus terminating my concurrent directorship in that company and W. T. Grant Company.

Following this statement, I likewise informed Bond Stores, Incorporated of my intention to resign as a director, and on March 14, 1952, I resigned from Bond Stores, Incorporated, thus terminating my concurrent directorship in that company and Sears, Roebuck and Company.

I have, of course, no intention of ever going back on the Board of Directors of Bond Stores, Incorporated so long as I remain a director of Sears, Roebuck and Company. I have, through my counsel, advised the Department of Justice of this fact. It is obvious that my resignation is in no way a temporary expedient or stratagem, but a seriously considered decision after conferring with the officials of the corporations involved. My decision could not be revoked by me even if I wished to take such action hereafter, which I would never do.

The plaintiff has achieved its objective in the termination of my directorship of Bond Stores, Incorporated.
74 Nothing remains to be accomplished by continuing the action.

If the Court, or the plaintiff, deems it desirable, I should have no objection to the dismissal of this action being without prejudice to its revival in the event I should at any time in the future stand for election as, or become, a director of one of the corporate defendants while serving as a director of the other.

JOHN M. HANCOCK

Sworn to before me this
22 day of April, 1952.

R. C. KUHL
Notary Public. State of Florida at large
My commission expires Jan. 9, 1956.
Bonded by Mass. Bonding & Insurance Co.

75 [TITLE OMITTED]

Affidavit of C. E. Humm

STATE OF ILLINOIS,
COUNTY OF COOK, *ss.*:

C. E. HUMM, being duly sworn, deposes and says:

I am a Vice President of Sears, Roebuck and Company, a defendant in the above action, and make this affidavit in support of its motion to dismiss the action on the ground that it is moot.

This is an action brought under Section 8 of the Clayton Act alleging that it is unlawful for John M. Hancock to be, at the same time, a director of both the defendant Bond Stores, Incorporated, and the defendant Sears, Roebuck and Company. The object of the action is to compel Mr. Hancock to terminate his directorship of one or the other of said companies.

I am informed that on March 14, 1952 Mr. Hancock resigned as a director of Bond Stores, Incorporated. The object of this action has therefore been accomplished, and the question of whether his being a director of both companies at the same time violates Section 8 of the Clayton Act is now moot.

C. E. HUMM

Sworn to before me this
22nd day of April, 1952.

LEO H. ARNSTEIN

* * * * *

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76 [TITLE OMITTED]

Affidavit of Irving Cohen

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

IRVING COHEN, being duly sworn, deposes and says:

I am a Vice President of Bond Stores, Incorporated, a defendant in the above action, and make this affidavit in support of its motion to dismiss the action on the ground that it is moot.

This is an action brought under Section 8 of the Clayton Act alleging that it is unlawful for John M. Hancock to be, at the same time, a director of both the defendant

Bond Stores, Incorporated, and the defendant Sears, Roebuck and Company. The object of the action is to compel Mr. Hancock to terminate his directorship of one or the other of said companies.

On March 14, 1952 Mr. Hancock resigned as a director of Bond Stores, Incorporated. The object of this action has therefore been accomplished, and the question of whether his h ng a director of both companies at the same time violates ection 8 of the Clayton Act is now moot.

IRVING COHEN
V. P.

Sworn to before me this
21st day of April, 1952.

MAE MILENBACH
Notary Public in the State of New York
31-2694600
N. Y. Co. Qual. File N. Y. Reg.
My commission expires March 30, 1953

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77 [TITLE OMITTED]

Affidavit of Ellis H. Schechtman

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

ELLIS H. SCHECHTMAN, being duly sworn, deposes and says:

I am the Secretary-Treasurer of Bond Stores, Incorporated, one of the above named defendants.

At no time prior to the filing of the suit in this case did any governmental authority notify me as Secretary of the defendant, Bond Stores, Incorporated, nor, to the best of my knowledge, was any other officer of said company ever notified, of any claim that this company was in any way violating the terms of Section 8 of the Clayton Act, except that a few days prior to the filing of suit an agent of the Federal Bureau of Investigation called upon me, asked when Mr. Hancock joined our Board of Directors, where his residence was and upon whom process could be served. When I asked him about the nature and basis of the proposed action he stated that he had no knowledge or information about the facts or basis for such proposed action.

ELLIS H. SCHECHTMAN

Sworn to before me this
2nd day of May, 1952

MAE MILENBACH
Notary Public in the State of New York
31-2694600
N. Y. Co. Qual. File N. Y. Reg.
My commission expires March 30, 1953

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78 [TITLE OMITTED]

Affidavit of John M. Hancock

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

JOHN M. HANCOCK, being duly sworn, deposes and says:

I am a defendant in the above action, and make this supplemental affidavit in support of the motion of defendant Sears, Roebuck and Company to dismiss the complaint herein.

I became a director of Sears, Roebuck and Company on February 24, 1925, and was not a director of Bond Stores, Incorporated at that time. I did not become a director of Bond Stores, Incorporated until April 9, 1940.

JOHN M. HANCOCK

Sworn to before me this
1st day of May, 1952.

MORRIS GOLDEN
Notary Public, State of New York
No. 31-1479850
Qualified in New York County
Cert. filed with City Register N.Y. County
My commission expires March 30, 1953

79 [FILE ENDORSEMENT OMITTED]

80 IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Stipulation—filed May 14, 1952

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the plaintiff and the attorneys for the defendants Sears, Roebuck and Company and Bond Stores, Incorporated that the time to answer the interrogatories herein or to make any motion thereon, be and the same hereby is extended to and including ten (10) days after a decision by the Court on the pending motion of the defendants to dismiss the complaint in this action.

Dated New York, May 12, 1952.

MELVILLE C. WILLIAMS
Special Assistant to the Attorney General,
Attorney for Plaintiff,
Room 235, United States Court House,
Foley Square,
New York 7, N. Y.

SULLIVAN & CROMWELL
Attorneys for Defendants Sears, Roebuck and Company and Bond Stores, Incorporated,
48 Wall Street,
New York 5, N. Y.

SO ORDERED

May 13th, 1952.

EDWARD WEINFELD
U. S. D. J.

81 [FILE ENDORSEMENT OMITTED]

IN

UNITED STATES DISTRICT COURT

Civil Action No. 73-298

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

THE KROGER COMPANY, JEWEL TEA COMPANY, INC., and JOHN M. HANCOCK,

Defendants.

Complaint—filed February 27, 1952

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this action against the defendants, and complains and alleges as follows:

JURISDICTION AND VENUE

1. This complaint is filed and these proceedings are instituted against the defendants under Section 15 of the Act of Congress of October 15, 1914, 15 U.S.C. §25, c. 323, 38 Stat. 730, 736, as amended, commonly known as the Clayton Act, in order to prevent and restrain the continuing violation by the defendants, as hereinafter alleged, of Section 8 of the Clayton Act. The corporate defendants The Kroger Company and Jewel Tea Company, Inc. transact business within this district and the individual defendant John M. Hancock resides within this district.

THE DEFENDANTS

2. The Kroger Company, hereinafter referred to as "Kroger", is hereby made a defendant herein. Kroger is a corporation organized and existing under the laws of the State of Ohio. Kroger has capital, surplus and undivided profits aggregating more than $1,000,000 and is not a bank, banking association, trust company or common carrier subject to the Act to regulate commerce approved February 4, 1887.

83 3. Jewel Tea Company, Inc., hereinafter referred to as "Jewel", is hereby made a defendant herein. Jewel is a corporation organized and existing under the laws of the State of New York. Jewel has capital, surplus

and undivided profits aggregating more than $1,000,000 and is not a bank, banking association, trust company or common carrier subject to the Act to regulate commerce approved February 4, 1887.

4. John M. Hancock is hereby made a defendant herein. Said defendant is a resident of Scarsdale, in Westchester County, New York. For a number of years said defendant has been and now is a director of the defendant Kroger. For a number of years said defendant has also been and now is a director of the defendant Jewel.

NATURE OF TRADE AND COMMERCE

5. Defendant Kroger is engaged in the manufacture, purchase, distribution, shipment and sale of merchandise in interstate commerce.

6. Defendant Jewel is engaged in the manufacture, purchase, distribution, shipment and sale of merchandise in interstate commerce.

7. Both the defendants Kroger and Jewel manufacture or purchase, and distribute, ship and sell in interstate commerce many of the same classes of grocery and related products.

8. Defendant Kroger sells the aforementioned classes of products at retail through approximately 2,000 stores operated by it in various states of the United States.

9. Defendant Jewel sells the aforementioned classes of products at retail through approximately 150 stores operated by it in the Chicago, Illinois area. Defendant Jewel also sells the aforementioned classes of products at retail by door-to-door solicitation in about 43 states and the District of Columbia.

10. The defendant Jewel operates approximately 150 retail stores in the Chicago area where about 38 re-
84 tail stores operated by the defendant Kroger are also located. In this area the retail stores operated by the defendant Jewel sell the aforementioned classes of products in competition with the retail stores operated by the defendant Kroger. In various other areas in various states of the United States the defendant Jewel sells the aforementioned classes of products at retail by door-to-door solicitation in competition with retail stores operated by the defendant Kroger.

11. The aforementioned classes of products flow across state lines in a continuous stream of interstate commerce from the states of manufacture or purchase by the defendants Kroger and Jewel until they reach the ultimate consumers who buy the products from the defendants Kroger and Jewel in other states.

12. For many years the defendants Kroger and Jewel, by virtue of their business and location of operation, have been and now are competitors, so that the elimination of competition by agreement between them would constitute a violation of a provision of the antitrust laws.

OFFENSE CHARGED

13. For many years the defendant John M. Hancock has been a director at the same time of both the defendants Kroger and Jewel and is now a director of both the defendants Kroger and Jewel, in violation of Section 8 of the Clayton Act (15 U.S.C. §19, c. 323, 38 Stat. 732).

14. For many years the defendant Kroger has permitted the defendant John M. Hancock to be elected and to serve as one of its directors at the same time that the defendant John M. Hancock was a director of the defendant Jewel, and at the present time the defendant Kroger continues to permit the defendant John M. Hancock to serve as one of its directors at the same time that the defendant John M. Hancock is a director of the defendant Jewel, in violation of Section 8 of the Clayton Act.

15. For many years the defendant Jewel has permitted the defendant John M. Hancock to be elected and to
85 serve as one of its directors at the same time that the defendant John M. Hancock was a director of the defendant Kroger, and at the present time the defendant Jewel continues to permit the defendant John M. Hancock to serve as one of its directors at the same time that the defendant John M. Hancock is a director of the defendant Kroger, in violation of Section 8 of the Clayton Act.

16. The defendants have threatened to continue and will continue the aforesaid violation of Section 8 of the Clayton Act unless the relief prayed for herein is granted.

PRAYER

WHEREFORE, plaintiff prays:

1. That it be adjudged and decreed that the defendants have violated Section 8 of the Clayton Act.

2. That the defendant John M. Hancock be ordered and directed immediately to resign his directorship in the defendant Kroger or the defendant Jewel, or both, as the Court shall direct, and immediately to withdraw from participation in the direction or control of the business of such defendant company or companies from which he has been directed to resign.

3. That the defendant John M. Hancock be perpetually enjoined from becoming a director or serving as a director in any two or more competing corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in interstate commerce.

4. That the defendant company or companies from which the defendant John M. Hancock is directed to resign be compelled to accept his resignation and be enjoined from permitting him to be elected as a director or allowing him to serve as a director in the future.

5. That the defendants Kroger and Jewel each be perpetually enjoined from permitting to be elected or
86 allowing to serve as a director any person who is at the same time a director of a competitor corporation engaged in interstate commerce.

6. That the plaintiff have such other, further, and different relief as the case may require and the Court may deem just and proper in the premises.

7. That the plaintiff recover its taxable costs.

ALLEN A. DOBEY
DONALD F. MELCHIOR
FRANCIS J. HEOZEL JR.
Trial Attorneys

J. HOWARD MCGRATH
Attorney General

H. G. MORISON
Assistant Attorney General

SAMUEL K. ABRAMS
Special Assistant to the Attorney General

MELVILLE C. WILLIAMS
Special Assistant to the Attorney General

MYLES J. LANE
United States Attorney

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88 IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Interrogatories Propounded by the Plaintiff—filed April 3, 1952

TO: JEWEL TEA COMPANY, INC.

PLEASE TAKE NOTICE that pursuant to Rule 33 of the Federal Rules of Civil Procedure, the above named defendant is required to answer the following interrogatories and to serve such answers upon the undersigned within fifteen days from the service hereof.

State separately with respect to each of the following interrogatories the name, address, and position or title of each person furnishing the answer thereto.

The term "Jewel" when used herein shall be deemed to refer to the defendant Jewel Tea Company, Inc. The term "Kroger" when used herein shall be deemed to refer to the defendant The Kroger Company.

1. States the number of retail stores operated by Jewel and give the location, including street address, of each such store.

2. State the distance from each such store to the nearest retail store of Kroger.

3. With respect to each retail store operated by Jewel state the items offered for sale.

4. With respect to each such store state approximately how long Jewel has been engaged in selling each such item.

5. With respect to each such store state the name and location of each newspaper utilized for advertising any of such items for sale during 1951.

89 6. With respect to each such store state the name and location of each radio station utilized for advertising any of such items for sale during 1951.

7. With respect to each such store state the name and location of each TV station utilized for advertising any of such items for sale during 1951.

8. State as to each such store operated by Jewel whether the store provides delivery service to customers of the store and if so give the limits of the area within which such delivery service is provided.

9. State as to each such store operated by Jewel which provides delivery service to customers whether there is a Kroger retail store within the limits of the area within which such delivery service is provided.

10. State as to each such store operated by Jewel which provides delivery service whether such delivery service includes deliveries across a state line.

11. State the total dollar volume of sales per each item per each retail store operated by Jewel for the year 1951.

12. State which of the items sold in retail stores operated by Jewel are manufactured, processed, or packaged by Jewel and give the place of manufacture, processing, or packaging.

13. State as to each of the items manufactured, processed, or packaged by Jewel and sold in its retail stores whether Jewel is continuously engaged in the manufacture, processing, or packaging of the item.

14. State which of the items sold in Jewel's retail stores are purchased by Jewel, from whom purchased, and from where shipped to, and where received by, Jewel.

15. With respect to each of the items purchased by Jewel for sale in its retail stores state whether Jewel owns any of the stock of the company from which the item is purchased, and if so the percentage of the total stock of such company owned by Jewel.

16. State as to each of the items purchased by Jewel for sale in its retail stores approximately how often, in the normal course of business, Jewel purchases the item.

90 17. State the location of each warehouse operated by Jewel from which deliveries are made to Jewel retail stores or direct to retail customers, give the location of each Jewel retail store to which Jewel makes deliveries

from each such warehouse, and state the area within which Jewel makes deliveries direct to retail customers from each such warehouse.

18. State approximately how often, in the normal course of business, shipments of each item listed in answer to interrogatory 3 above are made to each such warehouse.

19. State approximately how often, in the normal course of business, shipments of each such item are made from each such warehouse to each retail store of Jewel.

20. State approximately how often, in the normal course of business, shipments from any source of each such item are made to each retail store of Jewel.

21. State approximately how long, in the normal course of business, after the receipt of each such item, the item remains in a warehouse of Jewel prior to shipment to a retail store of Jewel.

22. State approximately how long, in the normal course of business, after the receipt of each such item by each retail store of Jewel, the item remains in stock prior to sale and delivery to the customer.

23. State whether each retail store of Jewel does its own buying, or whether Jewel maintains a central purchasing organization for all its retail stores and if so where the central purchasing organization is located. If any retail store of Jewel does any of its own buying, list the items purchased by such store, from whom purchased, and from where shipped to, and where received by, the store.

24. State as to each of the items listed in answer to interrogatory 3 above whether Jewel is continuously engaged in selling the item through its retail stores.

91 25. State the number of truck routes operated by Jewel and give the full route of each such truck route and state the area served by each such truck route.

26. State the distance from each such truck route at the nearest point to a retail store of Kroger.

27. State as to each truck route operated by Jewel whether deliveries are made across a state line.

28. With respect to each such truck route state the items offered for sale by Jewel.

29. With respect to each such truck route state approximately how long Jewel has been engaged in selling each such item.

30. With respect to each such truck route state the name and location of each newspaper utilized for advertising the sale of items during 1951.

31. With respect to each such truck route state the name and location of each radio station utilized for advertising the sale of items during 1951.

32. With respect to each such truck route state the name and location of each TV station utilized for advertising the sale of items during 1951.

33. State the total dollar volume of sales per each item per each truck route operated by Jewel for the year 1951.

34. State which of the items sold on truck routes operated by Jewel are manufactured, processed, or packaged by Jewel and give the place of manufacture, processing, or packaging.

35. State as to each of the items manufactured, processed, or packaged by Jewel and sold on its truck routes whether Jewel is continuously engaged in the manufacture, processing, or packaging of the item.

36. State which of the items sold on Jewel's truck routes are purchased by Jewel, from whom purchased, and from where shipped to, and where received by, Jewel.

92 37. With respect to each of the items purchased by Jewel for sale on its truck routes state whether Jewel owns any of the stock of the company from which the item is purchased and if so the percentage of the total stock of such company owned by Jewel.

38. State as to each of the items purchased by Jewel for sale on its truck routes approximately how often, in the normal course of business, Jewel purchases the item.

39. State the location of each warehouse operated by Jewel from which deliveries are made to truck route salesmen and state the area within which truck route deliveries are made from each such warehouse.

40. State approximately how often, in the normal course of business, shipments of each item listed in answer to interrogatory 28 above are made to each such warehouse.

41. State approximately how often, in the normal course of business, deliveries of each such item are made from each such warehouse to each truck route salesman of Jewel.

42. State approximately how often, in the normal course of business, shipments from any source of each such item are made to each truck route salesman of Jewel.

43. State approximately how long, in the normal course of business, after the receipt of each item, the item remains in a warehouse of Jewel prior to delivery to a truck route salesman of Jewel.

44. State approximately how long, in the normal course of business, after the receipt of each item by each truck route salesman of Jewel, the item remains in the possession of the truck route salesman prior to sale and delivery to the customer.

45. State whether each office of Jewel distributing items to truck route salesmen of Jewel does its own buying, or whether Jewel maintains a central purchasing organization for all its truck routes and if so where the central purchasing organization is located. If any office of Jewel distributing items to truck route salesmen does any of its own buying, list the items purchased by such office, from whom purchased, and from where shipped to, and where received by, the office.

93 46. State as to each of the items listed in answer to interrogatory 28 above whether Jewel is continuously engaged in selling the item on its truck routes.

47. State the location of each branch office of Jewel and the geographical area within which truck routes are operated from each such branch office.

48. State the location of each distribution point from which each truck route salesman obtains the items he offers for sale.

49. State as to each truck route operated by Jewel whether telephone or mail orders are accepted by Jewel for delivery by truck across a state line.

50. State as to each truck route operated by Jewel whether orders are taken by the truck route salesman for future delivery by truck across a state line.

51. State the length of time John M. Hancock has been a director of Jewel and the length of the term for which directors of Jewel are elected.

52. State whether the officers and directors of Jewel have known that John M. Hancock was also a director of Kroger, and if so how long the officers and directors of Jewel have known that John M. Hancock was a director of Kroger.

53. State whether any officer or director of Jewel has ever objected to the election of John M. Hancock to the board of directors or his membership on the board of directors on the ground that John M. Hancock was also a director of Kroger.

54. State whether the officers and directors of Jewel have known that Kroger was engaged in selling at retail items also sold at retail by Jewel in the same areas and if so how long the officers and directors of Jewel have had this knowledge.

ALLEN A. DOBEY
DONALD F. MELCHIOR
FRANCIS J. HEOZEL JR.
Trial Attorneys

SAMUEL K. ABRAMS
Special Assistant to the Attorney General

MELVILLE C. WILLIAMS
Special Assistant to the Attorney General

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94 * * * * * *

Affidavit of Service—(omitted in printing)

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95 [FILE ENDORSEMENT OMITTED]

96 IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Interrogatories Propounded by the Plaintiff—filed April 3, 1952

TO: THE KROGER COMPANY.

PLEASE TAKE NOTICE that pursuant to Rule 33 of the Federal Rules of Civil Procedure, the above named defendant is required to answer the following interrogatories and to serve such answers upon the undersigned within fifteen days from the service hereof.

State separately with respect to each of the following interrogatories the name, address, and position or title of each person furnishing the answer thereto.

The name "Kroger" when used herein shall be deemed to refer to the defendant The Kroger Company. The name "Jewel" when used herein shall be deemed to refer to the defendant Jewel Tea Company, Inc.

1. State the number of retail stores operated by Kroger and give the location, including street address, of each such store.

2. With respect to each such store operated by Kroger in the Chicago area including the suburbs of Chicago, state the distance from such store to the nearest retail store of Jewel.

3. With respect to each such store operated by Kroger which is not located in the Chicago area or the suburbs of Chicago, state the distance from such store to the nearest point on a truck route of Jewel.

4. With respect to each retail store operated by Kroger state the items offered for sale.

5. With respect to each such store state approximately how long Kroger has been engaged in selling each such item.

97 6. With respect to each such store state the name and location of each newspaper utilized for advertising any of such items for sale during 1951.

7. With respect to each such store state the name and location of each radio station utilized for advertising any of such items for sale during 1951.

8. With respect to each such store state the name and location of each TV station utilized for advertising any of such items for sale during 1951.

9. State as to each such store operated by Kroger whether the store provides delivery service to customers of the store and if so give the limits of the area within which such delivery service is provided.

10. State as to each such store operated by Kroger which provides delivery service to customers whether there is a Jewel retail store or a Jewel truck route within the limits of the area within which such delivery service is provided.

11. State as to each such store operated by Kroger which provides delivery service whether such delivery service includes deliveries across a state line.

12. State the total dollar volume of sales per each item per each retail store operated by Kroger for the year 1951.

13. State which of the items sold in the retail stores operated by Kroger are manufactured, processed, or packaged by Kroger and give the place of manufacture, processing, or packaging.

14. State as to each of the items manufactured, processed, or packaged by Kroger and sold in its retail stores whether Kroger is continuously engaged in the manufacture, processing, or packaging of the item.

15. State which of the items sold in Kroger's retail stores are purchased by Kroger, from whom purchased, and from where shipped to, and where received by, Kroger.

16. With respect to each of the items purchased by Kroger for sale in its retail stores state whether Kroger owns any of the stock of the company from which
98 the item is purchased and if so the percentage of the total stock of such company owned by Kroger.

17. State as to each of the items purchased by Kroger for sale in its retail stores approximately how often, in the normal course of business, Kroger purchases the item.

18. State the location of each warehouse operated by Kroger and the location of each Kroger retail store to which Kroger makes deliveries from each such warehouse, and state the area within which Kroger makes deliveries direct to retail customers from each such warehouse.

19. State approximately how often, in the normal course of business, shipments of each item listed in answer to interrogatory 4 above are made to each such warehouse.

20. State approximately how often, in the normal course of business, shipments of each such item are made from each such warehouse to each retail store of Kroger.

21. State approximately how often, in the normal course of business, shipments from any source of each such item are made to each retail store of Kroger.

22. State approximately how long, in the normal course of business, after the receipt of each such item, the item remains in a warehouse of Kroger prior to shipment to a retail store of Kroger.

23. State approximately how long, in the normal course of business, after the receipt of each such item by each retail store of Kroger, the item remains in stock prior to sale and delivery to the customer.

24. State whether each retail store of Kroger does its own buying, or whether Kroger maintains a central purchasing organization for all its retail stores and if so where the central purchasing organization is located. If any retail store of Kroger does any of its own buying, list the items purchased by such store, from whom purchased, and from where shipped to, and where received by, the store.

99 25. State as to each of the items listed in answer to interrogatory 4 above whether Kroger is continuously engaged in selling the item through its retail stores.

26. State the length of time the defendant John M. Hancock has been a director of Kroger and the length of the term for which directors of Kroger are elected.

27. State whether the officers and directors of Kroger have known that John M. Hancock was also a director of Jewel and if so how long the officers and directors of Kroger have known that John M. Hancock was a director of Jewel.

28. State whether any officer or director of Kroger has ever objected to the election of John M. Hancock to the board of directors or his membership on the board of directors on the ground that John M. Hancock was also a director of Jewel.

29. State whether the officers and directors of Kroger have known that Jewel was engaged in selling at retail items also sold at retail by Kroger in the same areas and if so how long the officers and directors of Kroger have had this knowledge.

ALLEN A. DOBEY
DONALD F. MELCHIOR
FRANCIS J. HEOZEL JR.
Trial Attorneys

SAMUEL K. ABRAMS
Special Assistant to the Attorney General

MELVILLE C. WILLIAMS
Special Assistant to the Attorney General

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100 * * * * *

Affidavit of Service—(omitted in printing)

* * * * *

101 [FILE ENDORSEMENT OMITTED]

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102 IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Notice of Motion—filed May 6, 1952

SIRS:

PLEASE TAKE NOTICE that upon the complaint herein, the annexed affidavits of John M. Hancock, sworn to April 22, 1952, of R. D. Sturtevant, sworn to April 22, 1952, and of John M. Hancock, sworn to May 1, 1952, the undersigned will move this Court at a Stated Term for Motions to be held in Room 506 of the United States Court House, Foley Square, Borough of Manhattan, City, County and State of New York, on May 13, 1952, at 10:00 A.M., or as soon thereafter as counsel can be heard, for an order dismissing the complaint, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, on the grounds (i) that the controversy is moot; (ii) that authority to enforce compliance with Section 8 of the Clayton

Act is vested in the Federal Trade Commission and not in this Court; (iii) on behalf of defendant Jewel Tea Company, Inc. that Section 8 of the Clayton Act is addressed to the individual who is a director, and not to the corporations; and, (iv) on behalf of defendant Jewel Tea Company, Inc., that Section 8 of the Clayton Act is inapplicable to it because defendant Hancock was not a director
103 of The Kroger Company when he became a director of Jewel Tea Company, Inc.; and for such other and further relief as to the Court may seem just and proper.

Dated: May 5, 1952
New York, N. Y.

Yours, etc.,

SULLIVAN & CROMWELL,

By. EUSTACE SELIGMAN
(A Member of the Firm)
Attorneys for Defendants, Jewel Tea Company, Inc. and John M. Hancock,
48 Wall Street,
New York 5, N. Y.

To:

MELVILLE C. WILLIAMS, ESQ.
Special Assistant to the Attorney General,
Anti-Trust Division,
Room 235, U. S. Court House,
Foley Square,
New York, N. Y.

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104 [TITLE OMITTED]

Affidavit of John M. Hancock

STATE OF FLORIDA,
COUNTY OF LEE, *ss.*:

JOHN M. HANCOCK, being duly sworn, deposes and says:

I am a defendant in the above action, and make this affidavit in support of my motion to dismiss the action on the ground that it is moot.

This is an action brought under Section 8 of the Clayton Act, alleging that it is unlawful for me to be, at the same time, a director of both the defendant The Kroger Com-

pany and the defendant Jewel Tea Company, Inc. The object of the action is to compel me to terminate my directorship of one or the other of said companies.

On March 5, 1952 I terminated my directorship of The Kroger Company. The object of this action has therefore been accomplished, and the question whether my being a director of both companies at the same time violates Section 8 of the Clayton Act is now moot.

My action was taken not because I believed that Section 8 of the Clayton Act is applicable, but because I did not believe I was justified in involving these two corporations in the trouble and expense which would be required by a test of the action.

105 I have been advised by counsel that it is doubtful whether Section 8 of the Clayton Act is applicable to my concurrent directorship in these two corporations, and that the legal question is one of construction of the language of the Act, which has never heretofore been construed.

The question of the application of Section 8 of the Clayton Act to directorships held by me was first raised by the Department of Justice in the letter from John F. Sonnett, Assistant Attorney General, dated June 19, 1947. During the period of almost five years from such date to the beginning of this action, my counsel and I had numerous conferences with the Department of Justice and submitted numerous memoranda of facts and of law to the Department of Justice.

On February 28, 1952, the United States Government instituted this action and also two other actions to terminate my concurrent directorships in two other pairs of companies.

On March 5, 1952, at the annual meeting of stockholders of The Kroger Company, the President of that company made the following statement:

> "John M. Hancock, who has served as a director of The Kroger Co. for 25 years, has asked me to state to this meeting that he has decided with great regret not to stand for reelection this year. Mr. Hancock explained that his decision was brought about by a suit recently commenced by the Department of Justice questioning whether Mr. Hancock can be a director of our company and of Jewel Tea Company at the same time.
>
> The Department of Justice has acted under a statute which states, in relevant part, that a person may

not at the same time be a director of two companies if 'the elimination of competition by agreement between them would constitute a violation of any provisions of any of the antitrust laws.'

It is not claimed that any such agreement exists between our company and Jewel Tea Company or
106 that it would be possible for the two companies, by agreement or otherwise, to eliminate competition in the food industry. Moreover, the statute was passed in 1914 but no court has ever said what it means. With reference to the antitrust laws in general, a Supreme Court Justice has said within recent years that not even the lawyers can determine 'what business conduct will be pronounced lawful or unlawful by the courts'.

Due to the resulting confusion, the Congress has undertaken a clarification of the antitrust laws.

Under all these circumstances, Mr. Hancock feels that he would prefer to avoid the necessity for our company's contesting the suit."

Following this public statement, I informed S. H. Kress & Company of my intention to resign as a director, and on March 11, 1952, I resigned from the Board of Directors of S. H. Kress & Company, thus terminating my concurrent directorship in that company and W. T. Grant Company.

Following this statement, I likewise informed Bond Stores, Incorporated of my intention to resign as a director, and on March 14, 1952, I resigned from Bond Stores, Incorporated, thus terminating my concurrent directorship in that company and Sears, Roebuck and Company.

I have, of course, no intention of ever going back on the Board of Directors of The Kroger Company so long as I remain a director of Jewel Tea Company, Inc. I have, through my counsel, advised the Department of Justice of this fact. It is obvious that my resignation is in no way a temporary expedient or stratagem, but a seriously considered decision after conferring with the officials of the corporations involved. My decision could not be revoked by me even if I wished to take such action hereafter, which I would never do.

The plaintiff has achieved its objective in the termination of my directorship of The Kroger Company. Nothing
107 remains to be accomplished by continuing the action.

If the Court, or the plaintiff, deems it desirable, I should have no objection to the dismissal of this action

being without prejudice to its revival in the event I should at any time in the future stand for election as, or become, a director of one of the corporate defendants while serving as a director of the other.

JOHN M. HANCOCK

Sworn to before me this
22 day of April, 1952.

R. C. KUHL
Notary Public, State of Florida at large
My commission expires Jan. 9, 1956.
Bonded by Mass. Bonding & Insurance Co.

* * * * *

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108 [TITLE OMITTED]

Affidavit of R. D. Sturtevant

STATE OF ILLINOIS,
COUNTY OF COOK, *ss.*:

R. D. STURTEVANT, being duly sworn, deposes and says:

I am Secretary of Jewel Tea Co., Inc., a defendant in the above action, and make this affidavit in support of its motion to dismiss the action on the basis of the grounds set forth in said motion.

This is an action brought under Section 8 of the Clayton Act alleging that it is unlawful for John M. Hancock to be, at the same time, a director of both the defendant The Kroger Company, and the defendant Jewel Tea Co., Inc. The object of the action is to compel Mr. Hancock to terminate his directorship of one or the other of said companies.

Mr. Hancock was first elected a director of Jewel Tea Co., Inc. on December 9, 1919 and has served on the board of directors continuously since that time. The date of his last election prior to the date upon which this suit was filed was March 29, 1949.

At no time prior to the filing of suit in this case did any governmental authority notify me as Secretary of the defendant Jewel Tea Co., Inc., nor to the best of my knowledge was any other officer of said company ever notified, of any claim that this company was in any way violating the terms of Section 8 of the Clayton Act, except that a few days prior to the filing of suit an agent of the Federal Bureau of Investigation called upon me, asked questions relating to service of process, and stated that the informa-

tion was requested in connection with a proposed action for alleged violation of said Section but that he had no information about the basis for such proposed action.

109 On the basis of reliable information, I believe that Mr. Hancock was first elected to the board of directors of The Kroger Company in 1926 or 1927; that he was last elected to said board early in March of 1951; and that on March 5, 1952 his term of office as a director of The Kroger Company terminated, and he was not reelected at the stockholders' meeting held on that date. The object of this action has therefore been accomplished, and the question of whether his being a director of both companies at the same time violates Section 8 of the Clayton Act is now moot.

R. D. STURTEVANT

Sworn to before me this
22nd day of April, 1952.

ELSIE S. HOMUTH
Notary Public
My commission expires April 25, 1954

* * * * *

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110 [TITLE OMITTED]

Affidavit of John M. Hancock

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

JOHN M. HANCOCK, being duly sworn, deposes and says:

I am a defendant in the above action, and make this supplemental affidavit in support of the motion of defendant Jewel Tea Company, Inc. to dismiss the complaint herein.

I became a director of Jewel Tea Company on December 9, 1919, and was not a director of The Kroger Company at that time. I did not become a director of The Kroger Company until December 16, 1927.

JOHN M. HANCOCK

Sworn to before me this
1st day of May, 1952.

MORRIS GOLDEN
Notary Public, State of New York
No. 31-1479850
Qualified in New York County
Cert. filed with City Register N.Y. County
Commission expires March 30, 1953

111 [FILE ENDORSEMENT OMITTED]

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112 IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Stipulation—filed May 14, 1952

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the plaintiff and the attorneys for the defendant Jewel Tea Company, Inc. that the time to answer the interrogatories herein or to make any motion thereon, be and the same hereby is extended to and including ten (10) days after a decision by the Court on the pending motion of the defendants to dismiss the complaint in this action.

Dated New York, May 12, 1952.

MELVILLE C. WILLIAMS
Special Assistant to the Attorney General,
Attorney for Plaintiff,
Room 235, United States
Court House,
Foley Square,
New York 7, N. Y.

SULLIVAN & CROMWELL
Attorneys for Defendant Jewel Tea Company, Inc.,
48 Wall Street,
New York 5, N. Y.

SO ORDERED

May 13th, 1952.

EDWARD WEINFELD
U. S. D. J.

114 IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Stipulation—filed June 2, 1952

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the plaintiff and the attorneys for the defendant The Kroger Company that the time to answer the interrogatories herein or to make any motion thereon, be and the same hereby is extended to and including ten (10) days after a decision by the Court on the pending motion of the defendants to dismiss the complaint in this action.

Dated: New York, N.Y.
May 28, 1952.

MELVILLE C. WILLIAMS
Special Assistant to the Attorney General
Attorney for the Plaintiff
Room 235, United States Court House
Foley Square, New York 7, N. Y.

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

By: EDWARD N. COSTIKYAN
Attorneys for defendant
The Kroger Company
575 Fifth Avenue
New York 22, N. Y.

SO ORDERED:

May 29, 1952.

EDWARD A. CONGER
U. S. D. J.

115 [FILE ENDORSEMENT OMITTED]

116

IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Notice of Motion—filed August 11, 1952

SIRS:

PLEASE TAKE NOTICE that, upon the complaint herein, the Memorandum submitted herewith, and the annexed affidavit of Thomas T. Oyler, the undersigned will move this Court at a Stated Term for Motions, to be held in Room 506 of the United States Court House, Foley Square, Borough of Manhattan, City, County and State of New York, on May 20, 1952, at 10:00 A. M., or as soon thereafter as counsel can be heard, for an order dismissing the action, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, on the grounds (i) that the controversy is moot; (ii) that the complaint fails to state a claim upon which relief can be granted against the corporate defendant, The Kroger Company, and could not state such a claim because Section 8 of the Clayton Act imposes no liability upon corporations; (iii) that if any jurisdiction with respect to corporations exists
117 under Section 8, it is vested exclusively in the Federal Trade Commission, and this Court has no jurisdiction; and for such other and further relief as to the Court may seem just and proper.

Dated: May 19, 1952.

Yours, etc.

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

By SAMUEL J. SILVERMAN
(A Member of the Firm)
575 Madison Avenue
New York 22, New York

ARNOLD, FORTAS & PORTER

By ABE FORTAS
(A Member of the Firm)
1200 Eighteenth Street, N.W.
Washington 6, D. C.

Attorneys for Defendant,
The Kroger Company.

To:

MELVILLE C. WILLIAMS, Esq.
Special Assistant to the
Attorney General
Antitrust Division
Room 235, U. S. Court House
Foley Square
New York, New York

Service acknowledged May 20, 1952

ALLEN A. DOBEY
Trial Attorney, Dept. of Justice

118 [FILE ENDORSEMENT OMITTED]

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119 [TITLE OMITTED]

Affidavit of Thomas T. Oyler

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

THOMAS T. OYLER, residing at Fourth and Broadway, Cincinnati, Ohio, being first duly sworn, deposes and says as follows:

1. That he is Assistant Secretary and General Counsel of The Kroger Company, defendant in the above-entitled action, and that he makes this affidavit in connection with the motion of defendant Kroger to dismiss the action.

2. That the defendant Hancock is not now a member of Kroger's Board of Directors and that both Mr. Hancock and the corporation have given assurances that he will not become a director of Kroger, so long as he is a director of Jewel Tea Company.

3. That on February 6, 1952, a Special Agent of the Federal Bureau of Investigation called at the general office of defendant, The Kroger Company, in Cincin-
120 nati, Ohio, and posed certain interrogatories to deponent; that the nature of these interrogatories was to determine whether The Kroger Company was amenable to suit in the United States District Court for the Southern District of New York; and that to the best of de-

ponent's information and belief the aforesaid interview was the first indication to any official of The Kroger Company that the Department of Justice considered the corporation itself to be violating Section 8 of the Clayton Act by virtue of the presence of Mr. John M. Hancock, defendant in this action, on the Board of Directors of The Kroger Company, and the first indication that the Department proposed to file suit against The Kroger Company based on such violation.

4. That on the following day, February 7, 1952, Mr. Joseph B. Hall, President of The Kroger Company, was notified by the defendant Hancock that the latter had received information from the Department of Justice that the Department proposed to institute legal proceedings against Hancock, The Kroger Company and Jewel Tea Company.

5. That on February 8, 1952, a meeting of the Board of Directors of The Kroger Company was held; that on information and belief, the directors of The Kroger Company were advised and concluded that, although said Hancock's directorship did not violate any law, and particularly that the degree of competition prescribed by Section 8 of the Clayton Act did not exist between Kroger and Jewel, the corporation should not become involved in any controversy of this nature; and that the Board accordingly directed Mr. Hall, the President, to discuss the situation with the defendant Hancock and to request him to withdraw immediately as a candidate for reelection as a director of The Kroger Company and not to stand
121 for election at the next annual meeting of the stockholders of The Kroger Company to be held on March 5, 1952.

6. That on information and belief, Mr. Hall, the President, conveyed this direction of the Board of Directors to defendant Hancock within a short time after said meeting of the Board of Directors, and before this action was instituted.

7. That on February 27, 1952, before the withdrawal of Mr. Hancock could be effected, the complaint in this action was filed.

8. That on March 5, 1952, the annual meeting of the stockholders of The Kroger Company was held in Cincinnati, Ohio, that the defendant Hancock withdrew his

name from nomination as a director at said meeting; that a full slate of directors was elected at said meeting, not including defendant Hancock; and that from March 5, 1952, to date, defendant Hancock has not been a director of The Kroger Company.

9. That defendant Hancock has filed an affidavit stating that he will not serve as a director of Kroger so long as he is a director of Jewel Tea Company, Inc.; that The Kroger Company will not nominate or propose said Hancock for election as a director and to the full extent of its powers it will not suggest or encourage his selection.

10. That plaintiff has served on The Kroger Company a set of 29 interrogatories; that deponent has examined these interrogatories and has consulted with departmental heads within the organization of The Kroger Company with respect to the time and money necessary to answer the interrogatories; that said interrogatories request information with respect to The Kroger Company and its business operations in minute detail; that the com-
122 pilation of the information necessary to answer said interrogatories would result in a serious disruption of the normal business activities of Kroger.

11. That said interrogatories, for example, require The Kroger Company to compute and state the distance from each of its approximately 1900 stores to the nearest retail store or nearest point on a truck route operated by defendant Jewel Tea Company; that for another example, said interrogatories require Kroger to compile a complete list of each item offered for sale in each of its approximately 1900 stores, the length of time in which Kroger has been engaged in selling such items, the length of time each item is on the shelves of each store, the length of time each item remains in the Kroger warehouse, and the number of items with respect to each store that is delivered directly to the stores.

12. That a conservative estimate of the time involved in compiling and preparing the information called for by said interrogatories is one year, and a conservative estimate of the expense thereof is $250,000.00.

THOMAS T. OYLER

Sworn to before me this
19th day of May, 1952.

MARTIN KLEINBARD
Notary Public, State of New York
No. 31-7297800
Qualified in New York County
Certs. filed in N. Y. Co. Clk's & Reg's off.
Commission Expires March 30, 1954

Service acknowledged May 20, 1952

ALLEN A. DOBEY
Trial Attorney, Dept. of Justice

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124 IN

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 73-296

UNITED STATES OF AMERICA,
Plaintiff,

—v.—

W. T. GRANT COMPANY, S. H. KRESS & COMPANY,
and JOHN M. HANCOCK,
Defendants.

Civ. 73-297

UNITED STATES OF AMERICA,
Plaintiff,

—v.—

SEARS, ROEBUCK AND COMPANY, BOND STORES, INCORPORATED,
and JOHN M. HANCOCK,
Defendants.

In conclusion, I fail to see what right the plaintiff has to a direction that Hancock resign from all the companies.

I, therefore, believe the suit should be dismissed. Since the motion takes the form of summary judgment, it is not possible to resolve it by Judge Jones' method of dismissal without prejudice. However, this decision would not be a bar to a new suit in case possible violations arise in the future.

Motions granted.
Settle orders.

Dated:
August 11, 1952.

EDWARD A. CONGER
United States District Judge

129 [FILE ENDORSEMENT OMITTED]

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130 IN

UNITED STATES DISTRICT COURT

No. 73-296

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

W. T. GRANT COMPANY, S. H. KRESS & COMPANY, and JOHN M. HANCOCK,

Defendants.

Notice of Submission of Judgment

SIR:

PLEASE TAKE NOTICE that the within order and judgment will be submitted to Honorable Edward A. Conger, Judge of the United States District Court for the Southern District of New York, at the office of the Clerk of this Court, at the United States Court House, Foley Square, New York, N. Y., on the 27th day of August, 1952 at 10:30 o'clock in the forenoon.

Dated New York, August 25, 1952.

Yours, etc.,

EUGENE M. FOLEY,
Attorney for Defendant
W. T. Grant Company,
1441 Broadway
New York 18, N. Y.

DUER, STRONG & WHITEHEAD,
Attorneys for Defendant
S. H. Kress & Company,
15 Broad Street,
New York 5, N. Y.

SULLIVAN & CROMWELL,
Attorneys for Defendant
John M. Hancock,
48 Wall Street,
New York 5, N. Y.

To:

C. WORTH ROWLEY, ESQ.,
Special Assistant to the Attorney General,
Attorney for Plaintiff,
United States Court House,
Foley Square,
New York, N. Y.

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131 IN

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action 73-296

UNITED STATES OF AMERICA,

Plaintiff,

—against—

W. T. GRANT COMPANY, S. H. KRESS & COMPANY, and JOHN M. HANCOCK,

Defendants.

Judgment—filed August 29, 1952

The defendant W. T. Grant Company having moved for an order dismissing the complaint, pursuant to Rules

Civ. 73-298

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

THE KROGER COMPANY, JEWELL TEA COMPANY, INC., and JOHN M. HANCOCK,

Defendants.

Opinion—filed August 11, 1952

125 CONGER, *J.*:

MEMORANDUM

These are motions by the defendants to dismiss the complaints upon various grounds only one of which I feel it necessary to consider. That ground is that the controversy in each case is moot.

Since this defect, so-called, does not appear on the face of the complaints, the defendants have had to disclose it by affidavit. In this light it is incumbent on the Court to treat it as one for summary judgment. See Rule 12 (b) F.R.C.P.

The facts in each case are essentially the same save for the parties.

Section 8 of the Clayton Act in pertinent part provides:

126 "* * * no person at the time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, * * * if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of the anti-trust laws * * *." 15 U.S.C. §19.

Shortly after the filing of the complaints, and prior to March 15, 1952, Hancock failed to stand for reelection as a director of The Kroger Company and resigned his directorships in S. H. Kress & Company and Bond Stores, Inc. He, therefore, is no longer a director in competing companies.

In this setting the defendants say the controversies are moot and ask dismissal. The plaintiff resists, principally, I assume, because the Government would like to have some law on the subject of which there is a sparsity.

Hancock has known of the Government's objections for the last five years or so and he has been discussing it from time to time with the Government. But there is no showing of direct knowledge on the part of the corporations.

Despite the fact that Hancock's removal from these directorships has apparently remedied all the grievances the Government had, counsel insists that it is entitled to a decree that the defendants have violated Section 8; to
127 an injunction against the defendants violating the Act in the future anytime, anywhere; and to a direction, if the Court sees fit, that Hancock resign from all the competing corporations.

All the parties have cited many cases wherein injunctions were sought on the question of mootness. The Government stresses *United States* v. *Trans-Missouri Freight Association, 166 U. S. 290.* There, however, the Supreme Court rejected the defense of mootness when it appeared highly probable and evident that violations would be resumed in the future. The defendants cite among others, *United States v. Aluminum Co. of America, 148 F. (2d) 416, (C.A. 2, 1945)* wherein Judge Learned Hand stated at page 448:

> "The mere cessation of an unlawful activity before suit does not deprive the court of jurisdiction to provide against its resumption; a 'case of controversy' may remain to be disposed of. There are plentiful authorities so holding. [Cases cited] To disarm the court it must appear that there is no reasonable expectation that the wrong will be repeated."

See also *Bus Employees* v. *Wisconsin Board, 340 U.S. 416.*

That statement of Judge Learned Hand expresses the rule as the cases treat it.

I do not think there is the slightest threat that the defendants will attempt any future activity in violation of Section 8 [if they have violated it already], and I
128 am inclined to follow Judge Jones in *U. S. v. Mather, et al. (N.D., Ohio)* who dismissed a similar suit as moot on December 2, 1935 for the same reasons urged here. There was no written opinion by the Judge but his remarks are quoted in the Government's motion (dated February 11, 1936) to dismiss without prejudice after the prior dismissal. There appears to be no other precedent.

The suit is not continued a controversy merely because a decree of past violation is sought. See *Standard Oil Co. v. United States, 283 U. S. 163; Walling* v. *Lacy, 51 F. Supp. 1002 (D.C. Colo., 1943).*

12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, on the grounds (i) that the controversy is moot; (ii) that authority to enforce compliance with Section 8 of the Clayton Act is vested in the Federal Trade Commission and not in this Court; (iii) that Section 8 of the Clayton Act is addressed to the individual who is a director, and not to the corporations; and that Section 8 of the Clayton Act is inapplicable to the defendant, W. T. Grant Company because defendant John M. Hancock was not a director of S. H. Kress & Company when he became a director of W. T. Grant Company; and the defendant S. H. Kress & Company having moved for an order dismissing the complaint herein pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure on the grounds (1) that the controversy is moot; (2) that authority to enforce compliance with Section 8 of the Clayton Act is vested in the Federal Trade Commission and not in this Court; and (3) that Section 8 of the Clayton Act is addressed to the individual who is a director and not to the corporation; and the defendant John M. Hancock having moved
132 for an order dismissing the complaint, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, on the grounds (i) that the controversy is moot; and (ii) that authority to enforce compliance with Section 8 of the Clayton Act is vested in the Federal Trade Commission and not in this Court; and the said motions having duly come on to be heard, and after hearing Eugene M. Foley, Esq., attorney for defendant W. T. Grant Company, Duer, Strong & Whitehead (Harman Hawkins, Esq. of counsel), attorneys for defendant S. H. Kress & Company, and Sullivan & Cromwell (Eustace Seligman, Esq. of counsel), attorneys for defendant John M. Hancock, in favor of the motions, and C. Worth Rowley, Special Assistant to the Attorney General (Allen A. Dobey, Esq. of counsel), attorney of the plaintiff, in opposition to the motions, and the Court having considered the motions as motions for summary judgment and having filed its opinion herein, and after due deliberation, it is

On motion of Eugene M. Foley, Esq., attorney for defendant W. T. Grant Company, of Duer, Strong & Whitehead, Esqs., attorneys for defendant S. H. Kress & Company, and of Sullivan & Cromwell, Esqs., attorneys for defendant John M. Hancock herein,

ORDERED that the motions be and the same hereby are granted on the ground that the controversy is moot and

the complaint be and the same hereby is dismissed; and it is further

ORDERED and ADJUDGED that the Clerk of this Court be and he hereby is directed to enter judgment dismiss-
133 ing the complaint herein.

Dated New York, August 27th, 1952.

EDWARD A. CONGER,
U. S. D. J.

JUDGMENT ENTERED August 29th, 1952.

WILLIAM V. CONNELL,
Clerk.

134 [FILE ENDORSEMENT OMITTED]

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135 IN

UNITED STATES DISTRICT COURT

No. 73-297

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

SEARS, ROEBUCK AND COMPANY, BOND STORES, INCORPORATED, and JOHN M. HANCOCK,

Defendants.

Notice of Submission of Judgment

SIR:

PLEASE TAKE NOTICE that the within order and judgment will be submitted to Honorable Edward A. Conger, Judge of the United States District Court for the Southern District of New York, at the office of the Clerk of this Court, at the United States Court House, Foley Square, New York, N. Y., on the 27th day of August, 1952 at 10:30 o'clock in the forenoon.

Dated New York, August 25, 1952.

Yours, etc.,

SULLIVAN & CROMWELL,
Attorneys for Defendants,
48 Wall Street,
New York 5, N. Y.

To:

C. WORTH ROWLEY, ESQ.,
Special Assistant to the Attorney General,
Attorney for Plaintiff,
United States Court House,
Foley Square,
New York, N. Y.

---

136 IN

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 73-297

UNITED STATES OF AMERICA,

Plaintiff,

—against—

SEARS, ROEBUCK AND COMPANY, BOND STORES, INCORPORATED, and JOHN M. HANCOCK,

Defendants.

Judgment—filed August 29, 1952

The defendants having moved for an order dismissing the complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, on the grounds (i) that the controversy is moot; (ii) that authority to enforce compliance with Section 8 of the Clayton Act is vested in the Federal Trade Commission and not in this Court; (iii) on behalf of defendants Sears, Roebuck and Company and Bond Stores, Incorporated, that Section 8 of the Clayton Act is addressed to the individual who is a director, and not to the corporations; and, on behalf of defendant Sears, Roebuck and Company, that Section 8 of the Clayton Act is inapplicable to it because defendant Hancock was not a director of Bond Stores Incorporated when he became a director of Sears, Roebuck and Company; and the said motion having duly come on to be heard, and after hearing Sullivan & Cromwell (Eustace

Seligman, Esq. of counsel), attorneys for the defendants, in favor of the motion, and C. Worth Rowley, Special Assistant to the Attorney General (Allen A. Dobey, Esq. of counsel), attorney for the plaintiff, in opposition to the motion, and the Court having considered the motion as a motion for summary judgment and having filed its opinion herein, and after due deliberation, it is

137 On motion of Sullivan & Cromwell, attorneys for the defendants herein,

ORDERED that the motion be and the same hereby is granted on the ground that the controversy is moot, and the complaint be and the same hereby is dismissed; and it is further

ORDERED and ADJUDGED that the Clerk of this Court be and he hereby is directed to enter judgment dismissing the complaint herein.

Dated New York, August 27th, 1952.

EDWARD A. CONGER,
U. S. D. J.

JUDGMENT ENTERED August 29th, 1952.

WILLIAM V. CONNELL,
Clerk.

138 [FILE ENDORSEMENT OMITTED]

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139 IN

UNITED STATES DISTRICT COURT

No. 73-298

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

THE KROGER COMPANY, JEWEL TEA COMPANY, INC., and JOHN M. HANCOCK,

Defendants.

Notice of Submission of Judgment

SIR:

PLEASE TAKE NOTICE that the within order and judgment will be submitted to Honorable Edward A. Conger, Judge of the United States District Court for the Southern Dis-

trict of New York, at the office of the Clerk of this Court, at the United States Court House, Foley Square, New York, N. Y., on the 27th day of August, 1952 at 10:30 o'clock in the forenoon.

Dated New York, August 25, 1952.

Yours, etc.,

SULLIVAN & CROMWELL,
Attorneys for Defendants
Jewel Tea Company, Inc., and
John M. Hancock,
48 Wall Street,
New York 5, N. Y.

PAUL, WEISS, RIFKIND, WHARTON & GARRISON,
575 Madison Avenue,
New York 22, N. Y.

and

ARNOLD, FORTAS & PORTER,
1200 Eighteenth Street, N.W.,
Washington 6, D. C.,
Attorneys for Defendant,
The Kroger Company.

To:

C. WORTH ROWLEY, ESQ.,
Special Assistant to the Attorney General,
Attorney for Plaintiff,
United States Court House,
Foley Square,
New York, N. Y.

140 In

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 73-298

UNITED STATES OF AMERICA,

Plaintiff,

—against—

THE KROGER COMPANY, JEWEL TEA COMPANY, INC., and JOHN M. HANCOCK,

Defendants.

Judgment—filed August 29, 1952

The defendant The Kroger Company having moved for an order dismissing the action, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, on the grounds (i) that the controversy is moot; (ii) that the complaint fails to state a claim upon which relief can be granted against the corporate defendant, The Kroger Company, and could not state such a claim because Section 8 of the Clayton Act imposes no liability upon corporations; (iii) that if any jurisdiction with respect to corporations exists under Section 8, it is vested exclusively in the Federal Trade Commission, and this Court has no jurisdiction; and the defendants Jewel Tea Company, Inc. and John M. Hancock having moved for an order dismissing the complaint, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, on the grounds (i) that the controversy is moot; (ii) that authority to enforce compliance with Section 8 of the Clayton Act is vested in the Federal Trade Commission and not in this Court; (iii) on behalf of defendant Jewel Tea Company, Inc. that Section 8 of the Clayton Act is addressed to the individual who is a director, and not to the corporations;

and (iv) on behalf of defendant Jewel Tea Company,
141 Inc., that Section 8 of the Clayton Act is inapplicable to it because defendant Hancock was not a director of The Kroger Company when he became a director of Jewel Tea Company, Inc.; and the said motions having duly come on to be heard, and after hearing Paul, Weiss, Rifkind, Wharton & Garrison, Esqs. and Arnold, Fortas & Porter, Esqs. (Abe Fortas, Esq. of counsel), attorneys for defendant The Kroger Company, and Sulli-

van & Cromwell, Esqs. (Eustace Seligman, Esq. of counsel), attorneys for the defendants Jewel Tea Company, Inc. and John M. Hancock, in favor of the motions, and C. Worth Rowley, Special Assistant to the Attorney General (Allen A. Dobey, Esq. of counsel), attorney for the plaintiff, in opposition to the motions, and the Court having considered the motions as motions for summary judgment and having filed its opinion herein, and after due deliberation, it is

On motion of Paul, Weiss, Rifkind, Wharton & Garrison, and Arnold, Fortas & Porter, attorneys for defendant The Kroger Company, and Sullivan & Cromwell, attorneys for defendants Jewel Tea Company, Inc. and John M. Hancock herein,

ORDERED that the motions be and the same hereby are granted on the ground that the controversy is moot and the complaint be and the same hereby is dismissed; and it is further

ORDERED and ADJUDGED that the Clerk of this Court be and he hereby is directed to enter judgment dismissing the complaint herein.

Dated New York, August 27th, 1952.

EDWARD A. CONGER,
U. S. D. J.

JUDGMENT ENTERED August 29, 1952.

WILLIAM V. CONNELL,
Clerk.

142 [FILE ENDORSEMENT OMITTED]

143 IN

UNITED STATES DISTRICT COURT

Civ. 73-296

UNITED STATES OF AMERICA

—vs—

W. T. GRANT COMPANY, S. H. KRESS & COMPANY, and JOHN M. HANCOCK

BASIS OF ACTION: Anti-Trust

ATTORNEYS

For Plaintiff:

MELVILLE C. WILLIAMS,
Spec. Asst. to Atty Genl
U.S. Courthouse

For Defendant:

DUER STRONG & WHITEHEAD (5-5-52)
15 Broad St. (5) (5-5-52)

EUGENE M. FOLEY
1441 Bway. (18) (5-5-52)

SULLIVAN & CROMWELL
48 Wall St. (5) (5-6-52)

Docket Entries

Date	Filings—Proceedings	Attorney Pltf.	D
Feb. 27–52	Filed complaint and issued summons.		
Mar. 3–52	" Summons & Return—Served E. M. Foley, Gen. Atty. for W. T. Grant Co. on 2-28-52; Served A. F. Gerber, Secy. for S. H. Kress & Co. on 2-29-52; Served Miss Honeck, Secy. for John M. Hancock on 2-28-52		

Date		Filings—Proceedings	Attorne Pltf.
Mar. 13–52	"	Stip. & Order extending time to answer to 4-7-52, (Grant)—	
Mar. 17–52	"	Stip. & Order extending time to answer to 4-9-52 (Kress)—	
Mar. 18–52	"	Stip. & Order extending time to answer to 4-8-52, —(Hancock)	
Apr. 3–52	"	Stip. & Order extending time to answer to 4-29-52, (Kress)	
Apr. 3–52	"	Interrog. to Grant	X
Apr. 3–52	"	Interrog. to Kress	X
Apr. 7–52	"	Stip. & Order extending time to answer to 4-28-52 —(Hancock)	
Apr. 8–52	"	Stip. & Order extending time to answer to interrog. to 4-29-52 Noonan, J.	
Apr. 11–52	"	Stip. & Order extending time to answer to 4-28-52, Noonan, J. (Grant)	
Apr. 11–52	"	Stip. & Order extending time to answer to interrog. to 4-28-52, Noonan, J. (Grant)	
144			
Apr. 11–52	Filed	Stip. & Order extending time to object to interrog. to 4-29-52, Noonan, J. (Kress)	
Apr. 25–52	"	Stip. & Order extending time to answer to 5-5-52, etc., I. R. Kaufman, J. (Grant)	

Date		Filings—Proceedings	Attorneys Pltf.	Attorneys Deft.
Apr. 25–52	"	Stip. & Order extending time to answer to 5-5-52, etc., I. R. Kaufman, J. (Kress)		
Apr. 25–52	"	Stip. & Order extending time to answer to 5-5-52, —(Hancock)		
Apr. 28–52	"	Stip. & Order extending time to answer to 5-19-52, I. R. Kaufman, J. (Kress)		
May 5–52	"	Notice of Motion to dismiss—Ret. 5-13-52 (Kress)		DS&W
May 5–52	"	Notice of Motion to dismiss—Ret. 5-13-52 (Grant)		EMF
May 5–52	"	Notice of Appearance (Kress)		DS&W
May 6–52	"	Notice of Motion to dismiss—Ret. 5-13-52 (Hancock)		S&C
May 12–52	"	Stip. & Order adjourning motions to dismiss to 5-20-52, Weinfeld, J.		
May 14–52	"	Stip. & Order extending time to answer to 5-19-52, Weinfeld, J. (Grant)		
May 14–52	"	Stip. & Order extending time to answer interrog. to ten days after decision of pending motion to dismiss, Weinfeld, J. (Kress)		
Aug. 11–52	"	Opinion #20,058 Suit dismissed, Conger, J.		
Aug. 11–52	"	Affdvt. of Orwill V. W. Hawkins		

Date		Filings—Proceedings	Attorneys Pltf.	Deft.
Aug. 29–52	8	Order & Judgment dismissing complaint as to deft. W. T. Grant Co., S. H. Kress & Co. and John M. Hancock, Conger, J. Mailed notice of Entry 9-2-52		S&C
Aug. 29–52	"	*Order & Judgment dismissing complaint as to deft. Kroger Co. and Jewel Tea Co., Conger, J.* [Material in italics is stricken through] Error, See Civ. 73-298		*S&C*
Oct. 27–52	"	Order allowing appeal, Conger, J. Mailed notice of entry 10-28-52	X	
Oct. 27–52	"	Petition for Appeal	X	
Oct. 27–52	"	Assignment of Error and Prayer for Reversal	X	
Oct. 27–52	"	Praecipe		
Oct. 27–52	"	Statement under Rule 12 of Sup. Ct. Rules		
Oct. 27–52	"	Statement as to Jurisdiction		
Oct. 29–52	"	Citation		
Nov. 6–52	"	Cross Praecipe		[redacted]W
Nov. 7–52	"	Counter-Praecipe		S&C
Nov. 12–52	"	Statement in opp. to Appellant's Statement of Jurisdiction and Motion to dismiss or affirm		DS&W
Nov. 12–52	"	Appellees' Opposing Statement and Motion to Affirm		S&C
Dec. 31–52	"	Copy Supple. Affdvt. of Orwill V. W. Hawkins		

IN

UNITED STATES DISTRICT COURT

Civ. 73-297

UNITED STATES OF AMERICA

—VS—

SEARS, ROEBUCK AND COMPANY, BOND STORES, INCORPORATED, and JOHN M. HANCOCK

BASIS OF ACTION: Anti-Trust

ATTORNEYS

For Plaintiff:

MELVILLE C. WILLIAMS
Spec. Asst. to Atty Gen'l
U.S. Courthouse

For Defendant:

SULLIVAN & CROMWELL (5-6-52)
48 Wall St.

Docket Entries

Date	Filings—Proceedings	Attorneys Plf.	Attorneys Deft.
Feb. 27–52	Filed complaint and issued summons.		
Mar. 3–52	" summons & return, served T. W. Bennett, Parent Auditor for Sears Roebuck and Co.; Ellis Schechtman, Treas. for Bond Stores, Inc.; Miss Honeck, Secy to John M. Hancock, on 2/28/52.		
Mar. 18–52	" stip & order extending time of defts Sears Roebuck, Bond Stores and John M. Hancock to answer to 4-8-52.		
Apr. 3–52	" interrogatories to Bond Stores		X

Date		Filings—Proceedings	Attorneys Pltf.	Attorneys Defts.
Apr. 3–52	"	interrogatories to Sears Roebuck		X
Apr. 7–52	"	stip & order extending time to answer to 4-28-52.		
Apr. 8–52	"	stip & order extending time to answer interrogatories by Pltff. to 4-28-52 —Noonan. J.		
Apr. 25–52	"	stip & order extending time to answer interrogatories to 5-19-52— I. Kaufman. J.		
Apr. 25–52	"	stip & order extending time of defts to answer to 5-5-52.		
May 6–52	"	affdvt & notice of motion to dismiss—Ret. 5-13-52		
May 12–52	"	stip. & order adjourning motion to dismiss to 5-20-52.		
146				
May 14–52	Filed	stip. & order extending time of defts. Sears, et ano to answers interrogatories to 10 days after decision on pending motion—Weinfeld, J.		
Aug. 11–52	"	Opinion #20058. Suit should be dismissed— Conger, J. (filed in Civ. 73-296)		
Aug. 29–52	"	order & Judgment dismissing complaint—Conger, J. mailed notice— 9-2-52		

Date		Filings—Proceedings	Attorneys Pltf.	Attorneys Deft.
Oct. 27–52	"	order allowing appeal Supreme Court, US—Conger, J. Mailed notice of entry 10/28/52. (Filed in Civ. 73-296)	X	
Oct. 27–52	"	petition for appeal to Supreme Court of USA (Filed in Civ. 73-296)		
Oct. 27–52	"	assignment of errors and prayer for reversal (filed in Civ. 73-296)		
Oct. 27–52	"	praecipe (filed in Civ. 73-296)		
Oct. 27–52	"	statement as to jurisdiction (filed in Civ. 73-296)		
Oct. 27–52	"	statement re: Rule 12, Revised Rules of Supreme Court USA (filed in Civ. 76-296)		
Oct. 29–52	"	Citation (filed Civ. 73-296)		
Nov. 6–52	"	Cross Praecipe (filed Civ. 73-296)		
Nov. 7–52	"	Counter-praecipe. (filed in Civ. 73-296)		
Nov. 12–52	"	Statement in opp. to Appellant's Statement of Jurisdiction and Motion to dismiss or affirm (filed Civ. 73-296)		DS&W
Nov. 12–52	"	Appellees' Opposing Statement and Motion to Affirm (filed Civ. 73-296)		S&C

In

UNITED STATES DISTRICT COURT

Civ. 73-298

UNITED STATES OF AMERICA

—vs—

THE KROGER COMPANY, JEWEL TEA COMPANY, INC., and JOHN M. HANCOCK

BASIS OF ACTION: Anti-Trust.

ATTORNEYS

For Plaintiff:

MELVILLE C. WILLIAMS
Spec. Asst to Atty Gen'l
U.S. Courthouse

For Defendant:

SULLIVAN & CROMWELL
48 Wall St. (5) (5-6-52)

PAUL WEISS RIFKIND WHARTON & GARRISON
575 Madison Ave. (22) (8-11-52)

Docket Entries

Date	Filings—Proceedings	Attorneys Pltf.	Attorneys Deft.
Feb. 27-52	Filed complaint and issued summons & additional summons.		
Feb. 29-52	" Summons & Return—Served J. M. O'Connor, V. Pres. for Jewel Tea on 2-28-52; Served Miss Honeck, secretary to John M. Hancock on 2-28-52		
Mar. 8-52	" Summons & Return—Served Thomas Oyler, Resident Agent for Kroger Co. on 3-5-52		

Date		Filings—Proceedings	Attorneys Pltf.	Deft.
Mar. 18–52	"	Stip. & Order extending time to answer to 4-8-52, (Jewel)—		
Mar. 18–52	"	Stip. & Order extending time to answer to 4-8-52, (Kroger)—		
Apr. 3–52	"	Interrog. to Jewel Tea	X	
Apr. 3–52	"	Interrog. to Kroger	X	
Apr. 7–52	"	Stip. & Order extending time to answer to 4-28-52 —(defts.)		
Apr. 8–52	"	Stip. & Order extending time to answer interrog. to 4-28-52, Noonan, J. (Kroger)		
Apr. 25–52	"	Stip. & Order extending time to answer interrog. to 5-19-52, I. R. Kaufman, J.		
Apr. 25–52	"	Stip. & Order extending time to answer to 5-5-52, —(illegible)		
148				
May 3–52	Filed	Stip. & Order extending time to answer to 5-26-52, I. R. Kaufman, J. (Kroger)		
May 6–52	"	Notice of Motion to dismiss—Ret. 5-13-52 (Jewel Tea Co. & Hancock)		S&C
May 12–52	"	Stip. & Order adjourning motions to dismiss to 5-20-52, Weinfeld, J.		
May 14–52	"	Stip. & Order substituting attys. for deft. Kroger,—Mailed notice of entry 5-15-52		

Date		Filings—Proceedings	Attorneys Pltf.	Deft.
May 14–52	"	Stip. & Order extending time to answer interrog. ten days after decision of motion to dismiss, Weinfeld, J. (Jewel)		
May 15–52	"	Stip. & Order extending time to answer interrog. to 6-9-52, Weinfeld, J. (Kroger)		
June 2–52	"	Stip. & Order extending time to answer interrog. to ten days after decision on pending motion to dismiss—Conger, J.		
Aug. 11–52	"	Opinion #20,058 Suit dismissed, Conger, J. (filed Civ. 73-296)		
Aug. 11–52	"	Affdvt. of Thomas T. Oyler		
Aug. 11–52	"	Notice of motion to dismiss (deft. Kroger Co.)		PWR W&G
Aug. 29–52	"	Order & Judgment dismissing complaint Jewel Tea, Kroger Co. and Hancock, Conger, J. Mailed notice of entry 9-2-52		S&C
Oct. 27–52	"	Order allowing appeal, Conger, J. (filed Civ. 73-296) Mailed notice of entry 10-28-52		
Oct. 27–52	"	Petition for Appeal (filed Civ. 73-296)	X	
Oct. 27–52	"	Assignment of Error and Prayer for Reversal (filed Civ. 73,296)	X	
Oct. 27–52	"	Praecipe (filed Civ. 73-296)	X	

Date		Filings—Proceedings	Attorneys Pltf.	Deft.
Oct. 27–52	"	Statement under Rule 12 of Sup. Ct. Rules (filed Civ. 73-296)	X	
Oct. 27–52	"	Statement as to Jurisdiction (filed Civ. 73-296)	X	
Oct. 29–52	"	Citation (filed Civ. 73-296)		
Nov. 6–52	"	Cross Praecipe (filed Civ. 73-296)		
Nov. 7–52	"	Counter-Praecipe (filed Civ. 73-296)		S&C
Nov. 7–52	"	Counter-Praecipe —		PWR W&G
Nov. 12–52	"	Statement in opp. to Appellant's Statement of Jurisdiction and Motion to dismiss or affirm (filed Civ. 73-296)		DS&W
Nov. 12–52	"	Appellees' Opposing Statement and Motion to Affirm (filed Civ. 73-296)		S&C
Nov. 12–52	"	Statement of Appellee Kroger Co. in opp. to jurisdiction		

149 IN

UNITED STATES DISTRICT COURT

Civ. 73-296

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

W. T. GRANT COMPANY, S. H. KRESS & COMPANY, and JOHN M. HANCOCK,

Defendants.

Civ. 73-297

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

SEARS, ROEBUCK AND COMPANY, BOND STORES, INCORPORATED, and JOHN M. HANCOCK,

Defendants.

Civ. 73-298

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

THE KROGER COMPANY, JEWELL TEA COMPANY, INC., and JOHN M. HANCOCK,

Defendants.

Petition for Appeal—filed October 27, 1952

The United States of America, plaintiff herein, considering itself aggrieved by the final judgments and decrees of the United States District Court for the Southern District of New York, entered in said court on August 29, 1952, in each of the above cases, prays that an appeal be
150 allowed from each of said judgments and decrees to the Supreme Court of the United States; that citation be issued in accordance with law; and that the material parts of the record, proceedings and papers upon which the said judgments and decrees were based duly authenti-

cated be sent to the Supreme Court of the United States in accordance with the rules in such cases made and provided.

The particulars wherein plaintiff considers the said judgments and decrees erroneous are set forth in the assignment of errors accompanying this petition, to which reference is hereby made.

Respectfully submitted,

NEWELL A. CLAPP
Acting Assistant Attorney General

DANIEL M. FRIEDMAN
Special Assistant to the Attorney General

Dated: October 27, 1952

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151 IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Order Allowing Appeal—filed October 27, 1952

The United States of America, plaintiff herein, having made and filed its petition praying that an appeal be allowed to the Supreme Court of the United States from the final judgments and decrees of this court in each
152 of the above causes entered on August 29, 1952, and also having presented its assignment of errors and prayer for reversal, and its statement as to jurisdiction, and having in all respects conformed to the statutes and rules of court in such cases made and provided;

IT IS ORDERED that the said appeals in each of the foregoing causes be and the same hereby is allowed as prayed for.

IT IS FURTHER ORDERED that citation shall issue in accordance with law.

EDWARD A. CONGER
United States District Judge

Dated: October 27, 1952.

153 IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Assignment of Errors and Prayer for Reversal—filed October 27, 1952

The United States of America, plaintiff in each of the above-entitled causes, in connection with its appeal to the Supreme Court of the United States, hereby files the
154 following assignment of errors upon which it will rely in its prosecution of said appeals from the final judgments of the District Court entered on August 29, 1952. The District Court erred:

1. In dismissing the cases as moot.

2. In failing to afford the plaintiff an opportunity to present evidence bearing on the need for the relief requested in the complaints.

3. In failing to grant the relief prayed in the complaints.

WHEREFORE, Plaintiff, the United States of America, prays that the final decree of the District Court in each of said causes be reversed, and for such other relief as the Court may deem fit and proper.

NEWELL A. CLAPP
Acting Assistant Attorney General

DANIEL M. FRIEDMAN
Special Assistant to the Attorney General

Dated: October 27, 1952

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155. • • • • •

Statement Directing Attention to Paragraph 3 of Rule 12 of the Revised Rules of the Supreme Court of the United States—(omitted in printing).

• • • • •

157 * * * * *

Citation in Usual Form Showing Service on Sullivan & Cromwell, *et al.*— (omitted in printing)

* * * * *

160 In

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Praecipe—filed October 27, 1952

To the Clerk of the Above-Named Court:

You will please prepare a transcript of the record in the above-entitled causes to be transmitted to the Clerk of the Supreme Court of the United States and include in said transcript the following:

161 1. Complaints in each of the above causes.

2. Defendants' motions to dismiss and attached affidavits in each of the above causes.

3. Memorandum of the district court.

4. Judgments of the district court in each of the above causes.

5. Petition for Appeal.

6. Order Allowing Appeal.

7. Citation on Appeal.

8. Assignment of Errors.

9. Statement as to Jurisdiction.

10. Statement Directing Attention to Paragraph 3 of Rule 12 of the Revised Rules of the Supreme Court of the United States.

11. Certificate of Service of Notice of Appeal.

12. This Praecipe.

NEWELL A. CLAPP
Acting Assistant Attorney General

DANIEL M. FRIEDMAN
Special Assistant to the Attorney General

Dated: October 27, 1952

162 IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Cross Praecipe—filed November 6, 1952

TO THE CLERK OF THE ABOVE NAMED COURT:

You will please prepare, in addition to the papers designated in plaintiff's praecipe dated October 27, 1952, a transcript of the following to be included in the record in United States of America, v. W. T. Grant Company,
163 S. H. Kress & Company and John M. Hancock, to be transmitted to the Clerk of the Supreme Court of the United States:

Supplemental affidavit of Orwill W. Hawkins, sworn to on the 16th day of May, 1952, submitted in support of the motion on behalf of S. H. Kress & Company to dismiss this motion.

Dated: November 5, 1952.

DUER, STRONG & WHITEHEAD,

By: HARMAN HAWKINS,
A member of the firm,
Attorneys for defendant,
S. H. Kress & Company,
15 Broad Street,
New York 5, New York.

164 [FILE ENDORSEMENT OMITTED]

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165 IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Counter-Praecipe—filed November 7, 1952

TO THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK:

In preparing the transcript of record in the above-entitled causes on the appeal of plaintiff taken October 27, 1952, please include in said transcript the following:

1. Interrogatories propounded by the plaintiff to the defendants Sears, Roebuck and Company, Bond Stores, Incorporated, and Jewel Tea Company, Inc.

2. Stipulations dated May 12, 1952, extending the time to answer interrogatories.

166 3. Opposing statements and motions submitted by the defendants-appellees, if any.

Dated New York, November 7, 1952.

Yours, etc.,

SULLIVAN & CROMWELL

By EUSTACE SELIGMAN
A Member of the Firm.
Attorneys for Defendants Sears, Roebuck and Company, Bond Stores, Incorporated, and Jewel Tea Company, Inc., and John M. Hancock,
48 Wall Street,
New York 5, N. Y.

Service of a copy of the foregoing counter-praecipe is hereby acknowledged this 7th day of November, 1952.

RICHARD B. O'DONNELL
Attorney for Plaintiff.

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Attorneys for Defendant
The Kroger Company.

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Attorney for Defendant
W. T. Grant Company.

DUER STRONG AND WHITEHEAD
Attorneys for Defendant
S. H. Kress & Company.

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167 . . . . .

Affidavit of Service—(omitted in printing)

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168 [FILE ENDORSEMENT OMITTED]

169 IN

UNITED STATES DISTRICT COURT

Civ. No. 73-298

UNITED STATES OF AMERICA,

Plaintiff,

—against—

THE KROGER COMPANY, JEWEL TEA COMPANY, INC., and JOHN M. HANCOCK,

Defendants.

Counter-Praecipe—filed November 7, 1952

TO THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In preparing the transcript of record in the above-entitled cause on the appeal of plaintiff taken October 27, 1952, please include in said transcript the following:

1. Interrogatories propounded by the plaintiff to the defendant The Kroger Company.

2. Stipulation dated May 28, 1952 extending time to answer interrogatories.

Dated New York, November 7, 1952

Yours, etc.,

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
575 Madison Avenue
New York 22, N. Y.

and

ARNOLD, FORTAS & PORTER
1229 19th St. N.W.
Washington 6, D. C.
Attorneys for Defendant The Kroger Company

Service of a copy of the foregoing counter-praecipe is hereby acknowledged this 7th day of November, 1952.

RICHARD B. O'DONNELL
Attorney for Plaintiff

SULLIVAN & CROMWELL
Attorneys for Defendants Jewel Tea Company, Inc. and John M. Hancock

170 [FILE ENDORSEMENT OMITTED]

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176 . . . . . .

Clerk's Certificate to Foregoing Transcript —(omitted in printing)

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178 IN THE

SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1952

No. 532

UNITED STATES OF AMERICA,
Appellant,

—v.—

W. T. GRANT COMPANY, *et al.*

Statement of Points to Be Relied upon and Designation of Parts of Record to Be Printed—filed January 17, 1953

1. Appellant adopts for its statement of points upon which it intends to rely in its appeal to this Court the points contained in its Assignment of Errors heretofore filed.

2. Appellant designates for printing by the Clerk of this Court the record herein as filed in this Court pursuant to appellant's praecipe to the Clerk of the United States District Court for the Southern District of New York, except

that there may be omitted the documents covered by items 7, 9, 10 and 11 of said praecipe.

Dated this 16th day of January, 1953.

WALTER J. CUMMINGS, JR.
Solicitor General.

[FILE ENDORSEMENT OMITTED]

179

Certificate of Service—(omitted in printing)

* * * * *

181

IN THE

SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1952

[TITLE OMITTED]

Counter-Designation of Appellee The Kroger Company of Parts of Record to Be Printed—filed January 22, 1953

Appellee designates for printing by the Clerk of the Court herein the documents specified in its Counter-Praecipe, dated November 7, 1952, to the Clerk of the United States District Court for the Southern District of New York in its Case No. Civ. 73-298 (entitled United States of America v. The Kroger Company, Jewel Tea Co., Inc. and John M. Hancock).

K. NORMAN DIAMOND
ARNOLD, FORTAS AND PORTER
1229—19th Street, N.W.
Washington 6, D. C.
Attorneys for Appellee
The Kroger Company

January 21, 1953

[FILE ENDORSEMENT OMITTED]

182

Certificate of Service—(omitted in printing)

184

IN THE

SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1952

[TITLE OMITTED]

Designation of Additional Parts of Record to Be Printed—filed January 23, 1953

The Appellees Sears Roebuck & Co., Bond Stores, Incorporated, Jewel Tea Company, Inc., and John M. Hancock hereby designate for printing by the Clerk of this Court Items 1 and 2 of their counter-praecipe filed with the Clerk of the United States District Court for the Southern District of New York, and which were designated by said Appellees to be included in the transcript of the record herein.

Dated this 22nd day of January, 1953.

EUSTACE SELIGMAN

HOWARD T. MILMAN

SULLIVAN & CROMWELL

Attorneys for Appellees, Sears Roebuck & Co., Bond Stores, Incorporated, Jewel Tea Company, Inc. and John M. Hancock.

[FILE ENDORSEMENT OMITTED]

185

Certificate of Service—(omitted in printing)

187

IN THE

SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1952

[TITLE OMITTED]

Counter-Designation of Appellee S. H. Kress & Company of Parts of Record to Be Printed—filed January 24, 1953

Appellee, S. H. Kress & Company, designates for printing by the Clerk of this Court herein the documents specified in its cross-praecipe dated November 5, 1952, filed with the Clerk of the United States District Court for the Southern District of New York in Case No. Civ. 73-296 (entitled United States of America v. W. T. Grant Company, S. H. Kress & Company and John M. Hancock).

HARRY H. WIGGINS,
DUER, STRONG & WHITEHEAD,
15 Broad Street,
New York 5, New York.
Attorneys for Appellee,
S. H. Kress & Company

January 23, 1953.

188

Certificate of Service—(omitted in printing)

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190

SUPREME COURT
OF THE UNITED STATES

No. 532—October Term, 1952

[TITLE OMITTED]

Order Noting Probable Jurisdiction—February 2, 1953

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

Supreme Court of the United States of America—October Term 1952 #532. United States of America, Appellant vs. W. T. Grant Company, S. H. Kress & Company and John M. Hancock, et al. Filed January 5, 1953.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1953—242180 #4